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THE WESTERN LAW TIMES OF CANADA.

EDITOR:

ARCHER MARTIN,

BARRISTER-AT-LAW.

"We will sell to no man, we will deny no man, or defer right nor justice." —Magna Charta

VOL. 3.

WINNIPEG, CANADA.

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CORRIGENDA.

P. 70, last line; for "Law Society" read "reporting of the Law Society."
" 74, line 15; for "for" read "to."
" 77, line 6; for "Hill" read "Hull."

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THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. JANUARY, 1892. No. 1.

THE announcement of the death of His Royal Highness the Duke of Clarence and Avondale, at a time when the nation was preparing to rejoice with him on the occasion of his marriage to a most graceful and lovable Princess, came as a great shock to the English people the world over.

All Canadians, in common with the rest of the Queen's subjects, deplore and lament the death of the prospective heir to the throne of the British Empire, and deeply sympathize with the afflicted Royal Family and Princess May in their bereavement.

The Bar will not forget that the dead Prince was called to the degree of the "Utter Bar" of the Middle Temple in June 1885, and was then created a Master of the Bench of that Inn, like his Royal Father, the Prince of Wales.

DE PRÆSENTI.

AMENDMENTS TO THE LAW SOCIETYS' ACT.

In common with the great majority of the legal profession of Manitoba, we feel disappointed and mortified at the lamentable way, through lack of statutory authority, in which the Court of Queen's Bench and the Law Society have failed to remove the reproach now resting on the legal profession of this province in not being able to rid itself of members practically convicted of serious crimes.

We therefore call upon the judiciary and the bar to aid us in obtaining the passage of the following clauses, or ones similar in form, during the coming session of the legislature of this province, which will arm our courts and the Law Society with the necessary authority to deal with such persons as they deserve.

We submit the following draft clauses for the opinion of our readers, and will be heartily glad to have the same thoroughly discussed in these columns:

1. Any attorney of this province who has already been struck off the rolls of attorneys and is a barrister, is hereby disbarred, and the officials having custody of the barristers' rolls shall strike the name of any such disbarred person off the said rolls forthwith in open court.

2. Any barrister, being at the same time an attorney, who is disbarred, ceases thereby to be an attorney, and shall have his name forthwith struck off the rolls of attorneys in open court by the officials having the custody of such rolls, and shall cease to be either a barrister or attorney of this province.

3. Any attorney, being at the same time a barrister, who is struck off the rolls, shall be thereby disbarred as a barrister and shall have his name forthwith struck off the rolls of barristers in open court by the officials having the custody of such rolls, and shall cease to be either an attorney or barrister of this province,

4. Any barrister who has been disbarred shall not be admitted as an attorney or entered on the books of the Law Society of Manitoba, and any attorney who has been struck off the rolls shall not be called to the

bar or admitted as a student at law, unless he shall have been re-called or re-admitted as the case may be.

5. The Benchers alone shall have the power to call to the bar and admit as attorney, and the customary oaths shall be taken before the Full Court of Queen's Bench.

6. The members of the Law Society of Manitoba shall consist of barristers and attorneys at law of this province, and no others.

7. The Benchers shall have power to investigate any charges of unprofessional conduct preferred against any member of the Law Society, and may, after careful enquiry into the matters complained of, and after hearing the party against whom the charges are preferred, pass resolutions censuring and condemning the conduct of such member, and may also in their discretion disqualify and suspend such member from practising as a member of the Law Society in any capacity for any period not exceeding one year for each offence proven. Nothing herein contained shall be held to limit the powers already possessed by the Court of Queen's Bench in such, or similar matters.

In regard to the following clause we have only to say that we think it provides a remedy for a great defect in our Law Society, for although the Bar Committee and the Incorporated Law Society in England, representing both branches of the profession, meet annually or confer together as the interests of the profession require, yet there is now no recognized way, no matter how great the emergency, by which the barristers or solicitors of Manitoba can convey their wishes to their own representatives.

8. There shall be an annual meeting of the members of the Law Society on the first Monday in February in each year, to be held at some convenient place and time of day in the City of Winnipeg to be determined by the Benchers, and of which place and time the Secretary shall give at least three weeks notice to each member of the Law Society, and at such meeting an annual report of the affairs of the society, and a detailed and duly audited statement of the revenue and expenditure of the Society for the year ending the thirty-first day of December preceding, shall be presented by the Benchers to each member of the society; at such meeting any member of the Law Society shall be entitled to discuss the affairs of the said society or any matters affcting the legal profession of Manitoba; and the majority of those present at such meeting may pass resolutions which shall be binding on and directory to the Benchers in the regulation of the affairs of the society.

9. This Act shall come into force the day it is assented to.

BRIEFS.

We must, for the first time, request the kind indulgence of our subscribers for the lateness of this issue, but owing to illness of our editor, delay on the part of our paper-makers, and the handing out of a large number of judgments during Term, the publication of this journal has been unavoidably delayed until now; we have also had to hold over a great deal of matter till next month.

The *Regina Leader*, under the peculiar title of "Costs of Barristers," makes a sweeping charge of "atrocious fees" against certain members, un-named, of the legal profession of the North-West Territories. It is to be hoped that the *Leader* has grounds for this accusation, but it is one which it is most unfair to make without hearing both sides of the case, and, unless specifically charged, as easy to allege and as hard to disprove as the common outcry against editors of using their columns for the purpose of private malice and not the public good.

The following gentlemen were called to the bar during Hilary Term;

H. H. Goulter, of Virden;

George Patterson, of Deloraine.

The following gentlemen were admitted as attorneys:

George Patterson, of Deloraine;

Martin Luther Grimmett, of Winnipeg.

Assizes—The assizes will be held as follows:

Eastern District: By the Honble. Mr. Justice Bain at Winipeg, Tuesday, March 8, next.

Central District: By the Honble. Chief Justice at Portage la Prairie, Tuesday, March 22, next.

Western District: By the Honble. Mr. Justice Dubuc at Brandon, Tuesday, March 15, next.

HENRY AUBER MACKELCAN, of Hamilton, Ontario, a solicitor, was struck off the rolls of the High Court of Justice of Ontario, in open court, on the tenth day of March, 1891, by the Assistant Registrar, pursuant to the direction of the Hon. Mr. Justice Ferguson, then presiding.

A FEW weeks ago, according to the *Irish Law Times* for January 16 ult., Mr. Sergeant Atkinson died in Bombay, where he had gone to live and practise in 1869. He was not, however, as stated by the paper from which our contemporary quotes, "the last of the sergeants;" three yet survive.

THE HONBLE. SIR ADAM WILSON, retired Chief Justice of Ontario since 1887, died at Toronto on the 29th of December last, deeply regretted.

WE regret to learn that Mr. William C. Hunter, of Deloraine, solicitor, died at that place on January 16 ult., of Bright's disease. He was buried at Griswold, where his father resides.

MR. GEORGE T. BERTHON, of Toronto, the well known artist, who has painted the portraits of so many of the judiciary, died in Toronto on January 18 ult., at the advanced age of 86.

MR. A. E. MCPHILLIPS, barrister-at-law, formerly of this city, and a prominent member of the junior bar of this province, has gone to Victoria, B.C., where he has entered on the practice of his profession. We regret his departure, yet feel sure he will prosper in the new field he has chosen.

THE Law students held a most successful dinner at the "Manitoba" on January 7 last. We regret that the address of Mr. Howell, Q.C., in answer to the toast of "The Bar," should have given offence to the students, but there is this consolation at least, that every other member of the bar repudiates the jealous and unprofessional feelings towards the students which Mr. Howell thought fit to state he entertained.

WE SHALL have something to say in our next issue on a recent prosecution before J. P.s at St. Laurent; and also in regard to a very strange proceeding on the trial of a recent case before the police magistrate of this city.

THE SECOND annual Bar Dinner will be held at the "Manitoba" on Wednesday evening the 24th instant. A dinner served in the best style of the *chef* of this grand new hotel, with music, etc., cannot fail to be a success.

LT.-COL. WILLIAM H. HERCHMER, assistant commissioner of the North-West Mounted Police, who died suddenly at Calgary, on the night of New Year's day, was called to the bar of this province on October 20, 1871. He was born on December 13, 1844.

WE ARE indebted to the editor of *Vanity Fair* for the "Winter Number" of that well known journal, containing an excellent coloured supplement of the English Bench and Bar, and a smart article on the profession.

SOME facetious limb of the law pinned the following notice to the door of the Referee's Chambers the other day:

NOTICE—Chambers will be held at 12 o'clock to-day, Tuesday, 9th February, 1892, by the Referee; PROVIDED he gets back from the curling bonspiel in time!

BY ORDER.

MR. DOUGLAS HARINGTON COLE, of Moosomin, was enrolled as an advocate of the North-West Territories on January 11, ult.

THE *Journal of Jurisprudence and Scottish Law Magazine* has ceased publication with the end of its thirty-fifth volume. It was an excellent paper.

THE LAST issue of the *Green Bag* contains the customary number of flamboyant articles on obscure judges.

THE *Scottish Law Review* for January has a fine photogravure of Lord President Robertson.

The *American Law Register* is not dead after all. We we were very pleased to receive the initial number of its 35th volume.

REVIEWS.

A GUIDE to Counting Votes at elections under The Ballot Act: being a digest of judicial decisions relating thereto, etc. By Thomas C. Down, of the Middle Temple, barrister-at-law, late an advocate of the North-West Territories of Canada. London: Knight & Co., 1891.

This is a very useful little pamphlet, the author of which is well known to many of the profession of Western Canada. The results of the decisions of the courts as to what are or are not valid ballots, are concisely stated in a convenient form. Mr. Down has carried out a good idea very happily, and his "Guide" will prove of much use in the hurry and rush of an election.

THE MANITOBAN; A Monthly Magazine and Review of Events. Winnipeg: The Manitoban Publishing Company.

We have received the first two numbers of this magazine, which, by every indication, will have a prosperous future. The want of a review in this province, such as the one under consideration, has long been felt, and we trust that the *Manitoban* will receive the support it justly deserves. It is well printed and neatly got up. The editor gives special attention to matters relating to the history of this country, and several gentlemen who are well qualified have already contributed articles in this connection. The price, one dollar per year, is really nominal, and by a very advantageous arrangement with the well-known *English Illustrated*, both periodicals are offered for the exceptionally low price of $2.35 per annum.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. FEBRUARY, 1892. No. 2.

DE PRÆSENTI.

SECOND ANNUAL BAR DINNER.

The Second Annual Dinner of the Bar of this Province was held at the "Manitoba" on the night of Wednesday, the 24th instant, under the auspices of the following committee: The Hon. Attorney-General, Messrs. Aikins, Q.C., Ewart, Q. C., Tupper, Q. C., Daly, Q. C., M. P., Haggart, Baker, Howard, McLaren, Perdue, Joseph Martin, Cameron, M.P.P., and Archer Martin, (hon. sec.-treas.)

Thirty-three gentlemen sat down at nine o'clock in the handsome ordinary of the "Manitoba," the Attorney-General presiding and Mr. Ewart, Q. C., in the vice-chair. To the right of the Attorney-General were the Hon. Mr. Justice Bain, Messrs. J. D. Cameron, M. P. P., Robert Cassidy, R. J. Wilson, R. M. Smith, W. R. Ross, A. N. McPherson, Arthur Clark, J. J. Moncrieff, (*Tribune*), H. A. McLean, J. Obed Smith, Isaac Pitblado, Wm. G. Bain, G. R. Howard and W. E. Perdue. To the right of the vice-chairman were Messrs. A. W. Ross, M. P., John Macbeth, F. H. Phippen, O. H. Clark, J. T. Huggard, F. S. Nugent, Alex. Haggart, J. B. McLaren, Wm. Bearisto, G.

H. West, G. A. Elliott, T. J. Mathers, E. C. Goulding, H. E. Crawford, R. H. H. Chapman (*Free Press*), and Archer Martin. The tables were most tastefully garnished with choice exotics, arranged in a graceful design, and the whole appointments, from the *boutonniére* handed to each gentleman as he entered, down to the *menu*, were most complete and everything that could be desired. The *menu* was quite original in design, and each of the many tempting dishes was accompanied by a quaint and appropriate quotation. So great is the demand for copies that it has been found necessary to reprint it. The orchestra rendered an excellent selection of operatic airs which added not a little to the enjoyment of the dinner, in the service of which the *chef* excelled himself.

Letters of regret, because of inability to attend, were received from the Hon. Chief Justice, Hon. Messrs. Justices Dubuc and Killam, Hon. Marc. A. Girard, the Father of the Bar, H. J. Macdonald, Q. C., M. P., W. J. Cooper, S. C. Biggs, E. H. Morphy, A. E. McPhillips, James Robinson, and others.

The toast of the "Queen and the Royal Family" was responded to right loyally, and was accompanied by the singing of the national anthem. The chairman then proposed "Our Country, which was replied to by Mr. Frank S. Nugent in a happy and patriotic vein. The next toast, that of the "Federal and Provincial Parliaments," was proposed by the vice-chairman in a neat and humourous speech and was responded to by Messrs. A. W. Ross, M. P., and J. D. Cameron, M. P. P. The former, who is one of the oldest members of the Bar, made a very interesting speech, in which he referred to the changes that had taken place in the profession in his time, the number of barristers in the Commons—71 out of 215—and the necessity of increasing the salaries of the judges. Mr. Cameron well sustained his reputation as an after-dinner speaker and took occa-

sion to refer to the necessity of obtaining legislation to arm the Law Society with power to purify the profession and so keep up its high standard.

"Bench and Bar" was responded to by Hon. Mr. Justice Bain and Mr. W. E. Perdue. In the course of a graceful speech the learned judge took occasion to remark that though a member of the bench, he was yet a member of the bar, and expressed the pleasure it gave him to be present at the annual dinner, and congratulated the committee on the establishment of it as one of the permanent institutions of the profession, out of which a great deal of good would arise in the fostering and promotion of a proper *esprit de corps*. The hearty co-operation of the bar with the bench was one of the reasons why the administration of justice in Canada stood on the lofty plane that it did. The speaker was very heartily applauded on resuming his seat. Mr. Perdue made a witty reply on behalf of the bar, treating this popular toast in a very entertaining manner.

"The Ladies" found worthy champions in Messrs. Cassidy and Mathers. This is an old toast for the first-named gentleman, and on this occasion he excelled himself; Mr. Mathers, on short notice, acquitted himself capitally and made a very favourable impression.

The editor of this journal had the honour of replying to "The Legal Press."

Mr. Justice Bain, just at parting, begged leave to propose the health of the "Chairman," in replying to which the Attorney-General stated that this was the first time he had been able to attend the bar dinner, and that he had concluded to do so in the first place mainly because of his official position as the head of the bar, but now that he had attended and had experienced so much pleasure from the evening's entertainment, and realized the great amount of good it was accomplishing, he would in future be one

of the warmest supporters of the annual dinner; he held it to be the duty of every member of the bar to do all that he could to encourage a high moral tone, and regarded this annual dinner, affording as it did a means of bringing together the profession, as a most valuable aid towards attaining that object; in conclusion he warmly congratulated the bar and the committee on the success that had crowned their efforts.

The national anthem was then sung and the diners dispersed at 1:30 a.m. after what according to the daily press, "will long be remembered as one of the most pleasant dinners ever held in the city," and which was remarkable for the cordiality and *bonhomie* which prevailed.

We have been requested to thank the following members of the bar, who, while unavoidably absent, yet gave the committee their support in the most practical manner by generously contributing towards the expenses: Messrs. J. A. M. Aikins, Q.C., W. H. Culver, Q.C., Hugh J. Macdonald, Q.C., M.P., J. Stewart Tupper, Q.C., Isaac Campbell, Q.C., James Fisher, M.P.P., J. E. P. Prendergast, M.P.P., G. W. Baker, J. H. Munson, R. W. Jameson, J. Stanley Hough, W. Hill Nash, E. D. Carey, J. H. Brown, A. V. McClenaghen, Ghent Davis, R. Ross Sutherland, W. J. Tupper, Alex. McLeod, Alex. Howden, James Heap, Alex. Dawson, J. T. Robarts, W. F. McCreary, J. G. Harvey, R. M. Thomson and J. A. Machray.

JUSTICES' JUSTICE.

The rural J.P. is proverbially wrong-headed and not seldom tyrannical and oppressive. Take for instance the harsh and cruel action of the three worthies of St. Laurent, Messrs. Hepworth, Mulvihill and Dickson, who coerced a poor wretch, who had been arrested on the groundless charge of stealing a bedstead of practically no value and which he claims to be his own, into entering into an agreement to hand over his own property to the prosecutor, pay the

costs of the court, and *fifty dollars* damages (?) and *not to appeal* from this monstrous finding!

We are glad to see that the Hon. Mr. Justice Dubuc stigmatized * these iniquitous proceedings as "a gross abuse of the criminal process of the court for the purpose of obtaining an undue advantage in a most trival matter," and immediately directed a *certiorari* to issue. What shall we say of the learned Q. C. who, having only an inexperienced solicitor's clerk opposed to him, allowed such a travesty on justice to be perpetrated?

THE PATENTS OF QUEEN'S COUNSEL.

To the general public the spectacle of three Queen's Counsel presenting their patents to the Court of Queen's Bench the other day in order to determine the right of precedence between them is incomprehensible. It is nevertheless right and proper that these questions should be settled now, for though at present, owing to the general excellent working of our judicial system and the capital Tuesday Trials there is never such a block of business in court or in chambers that counsel cannot be heard, and so the right of pre-audience amounts to little, yet the rapid growth of our population and the increase of business which will be consequent thereon and make this right of importance, justifies its assertion now. The, relatively, few members of our profession, however, who do not already possess the right to drape their classic forms in silk instead of stuff, need not be unduly alarmed that their ordinary rights as citizens will be encroached upon. On the way up to the court house they can still drop their "fare in the box on entering the car" without waiting for the silk gownsman to first purchase a "bunch" of 25 tickets for a dollar from the driver, permitting the frosty air to pour

* See report of *Regina* v. *Lacoursiere* in this issue.

through the open door and soar up their trouser legs while doing so.

We can further assure them that at luncheon in the court house, during the assizes, they can "tackle" one of the caterer's historic sandwiches without waiting to thresh out the question with their "senior" as to whether he is entitled as of right to take a first "whirl" at the collection of antiques which is provided for the delectation of the legal profession under that style of cause.

And finally, as an example of true "British justice," we unhesitatingly state that the well-known court house official who vends the law stamps of Her Majesty's Government for this Province, is no respecter of persons, and in the scramble for his wares during a busy morning, the humblest articled clerk who presents even 10 cents, cash, will receive attention before the most august member of the Bar who endeavours to do business on an I. O. U. basis to an unlimited amount, and this without regard to the fact that his patent might entitle him to precedence over the Chief Justice of Canada himself.

REAL PROPERTY ACT IN THE N. W. T.

Our readers will peruse with interest the important decision of Hon. Mr. Justice McGuire in the case of *re Bentley and Morris* which we report at length in this issue. The effect of this decision is that a mortgage in the N. W. T. can be registered without the production of the certificate of title, and it would almost seem that the same rule applies to the registration of a transfer.

A TOO ENTERPRISING FIRM.

Under the guise of attending to business before the Supreme Court on behalf of other solicitors, a legal firm in Ottawa has sent a touting circular to members of the profession in Western Canada who never employed them. These enterprising gentlemen should restrain their ardour

in this hot pursuit of agency fees, as they are only lowering themselves in the opinion of the firms they are beseiging for work at Ottawa.

NEW BOOKS AT THE LIBRARY.

Fry on Lunacy, 3rd edition, 1890.
Black on Judgments, 2 vols., 1891.
Williams and Bruce's Admiralty Practice, 1886.
Browne's Admiralty Procedure, 1887.
Rules of the Vice Admiralty Courts, 1883.
Buswell on Limitations, 1889.
Index of Cases Judicially noticed, 1865-1890, by Talbot & Fort.
Lindley on Companies, supplement, 1890.
Lindley on Partnership, supplement, 1890.
Canadian Orders in Council, 1849 to 1874.
Canadian Consolidated Orders in Council, 1889.
American Digest, Annual, 1891.
Chitty's Statutes, Annual Continuation, 1891.
Sedgwick on Damages, 1891.
Underhill on Torts, 1889.
Cobbey on Replevin, 1890.
British Columbia Statutes, 1891.
Addison on Contracts, 1892.
Maine's Ancient Law, 1889.
Ordinances of N. W. Territories, 1892.

FLOTSAM AND JETSAM.

THE LAW RELATING TO GHOSTS.

The Psychezetic Society has recently, at the request of one of its members whose premises were infested with a noisy ghost, taken the opinion of Mr. Bludgeon, Q. C., on a series of questions tending to elucidate the law as it relates to ghosts. The learned counsel's opinion has been forwarded to us for publication, and we have much pleasure in giving prominence to it. Mr. Bludgeon writes as follows :—

1. In answer to the first question, I am of opinion that an action for trespass will not lie against a ghost ; it follows that an injunction will not be granted. There is some uncertainty on the point ; but I think that a ghost is not, at common law, a legal person at all, and therefore neither possessed of rights nor subject to liabilities. There is no record in the books of any such action ; a fact in itself negative testimony of no small weight.

2. Subject to what follows, I think there is a cause of action against the executors. It has been held that a corpse is the property of its executors as being personal property ; the opinion of Taper, V. C., that by reason of burial, it might be said to savour of the realty being no longer law. The maxim of law is, *Mobila sequuntur personam*—the ghost follows the corpse; and in my opinion the Court would restrain the executors from allowing or suffering their ghost to trespass on the premises in question. In this case, however, the difficulty of discovering and serving the personal representatives would be almost insuperable, the ghost having been dead 500 years.

3. Yes. If the ghost sets up an adverse title, an action would lie on the covenant for quiet enjoyment : but *I*

must add that in my opinion there is evidence, and tolerably clear evidence, that in this case Mr. Squirms took with notice of the encumbrance, and, having obtained his lease at a lower rent in consideration of it, would be held in equity to be estopped from any such proceeding.

4. If Mr. Squirms is right in his conjecture—and a surveyor of respectability should be at once employed to ascertain whether he is or not—that the body of a ghost is buried on the premises, different considerations arise As above stated, a body is the property of the executors; but this rule is subject to the wider principle—*Quicquid plantatur solo, solo cedit;* and in my opinion the ghost by being planted or buried on the land, lapsed to the freeholder and become part of the inheritance. The freeholder must be taken to have known of its presence; and I think, although not without a doubt, that on the true construction of Mr. Squirms' lease, the body passed to him under the general words, and must be regarded, for the purposes of this case, as his own. If I am correct in this, Mr. Squirms is the author of his own wrong, and has the remedy in his own hands.

5. No. A ghost cannot require the owner of the premises on which his body is to bury it at the expense of the owner. In my opinion a ghost has no rights as such. It is not my duty to express an opinion on what the law ought to be, but merely to state what, in my opinion, it is.

6. If a spiritualist or other person, against the will of the executors or other the owners of a ghost, raises it and induces it to leave its owner and enter his service, I think an action would lie (*Lumley* v. *Gye*, 2 E. and B. 216-239).

7. A man has no right, in order to indulge his own taste, to introduce any ghost he may possess into his aunt's house, thereby destroying the amenity of her residence. *Sic utere tuo ut alienum non laedas.* A licence for any such

purpose is revocable, unless given for valuable consideration.

8. No. There is no such easement known to the law. A custom would require strict proof.

9. A ghost instructed to haunt any person on account of his employer, cannot with permission employ another to fulfil his duties. *Delegatus non potest delegare.*

10. The suspicion of an authentic ghost being on the premises does not warrant the officers of the Society in entering or remaining on the premises, nor in demanding refreshments while engaged thereon. If the interest of science demand such powers, recourse must be had to the Legislature. It is impossible for me to express any opinion as to the result of such an application.

11. The Public Health Act, in my opinion, gives the sanitary authority no jurisdiction over ghosts.

12. If the suggested explanation of the ghost's cries and groans be correct, the Court of the Ordinary would seem the proper tribunal. I recommend that the opinion of counsel learned in ecclesiastical law be taken on this point.

3 Mortar Buildings, Temple. SAMUEL BLUDGEON.

—*St. James Gazette.*

FOOLING A NEWSPAPER.

By the law of England can a man marry his widow's sister?—W.K.G.

The is nothing in the statute law of England to prevent him from doing so; but the common law forbids such a marriage.—New York Sun.

Oh, it does, does it. What has the common law to do with a man after his wife has put on mourning? Bring your great legal intellect to bear on that point. Does a man not have to die in order to create a widow? And that being true, how can he marry her sister? *N. Y. Morning Advertiser.*

REVIEWS.

THE MONTHLY LAW DIGEST AND REPORTER, containing a complete digest of all the decisions of the month, relating to mercantile law, the law of corporation, evidence, torts, patent, copyright, constitutional, criminal and other branches of the law, etc., gathered from each province of the Dominion, the United States, England, France, Ireland and Scotland. Edited by F. Longueville Snow, Law Librarian, Montreal: A. Periard, Montreal. $6.00 per annum.

One is almost alarmed at the comprehensive and cosmopolitan "platform" of this latest addition to the legal press of Canada, and the editor will manifestly have his hands full in faithfully carrying out the spirit of the enterprise. We hope it will be so carried out, for if it is—and judging by the initial number there is no reason why it should not be—this periodical will prove of very great assistance to the legal profession. All of its 66 pages are not devoted to the digest, for a good article on Public Policy, and other notes, take up the last seventeen pages. The printing is good, and the paper, but the margin is a little too narrow. Our new contemporary has our heartiest wishes for success, and we are glad to welcome such a very creditable new-comer to the fraternity of legal journalism.

WITHOUT A WILL, THEN? LAWS OF NEW YORK. By John L. Branch, Counsellor-at-law, Monograph Publishing Company, New York, 1892.

This is a sumptuously printed and gotten up *brochure* from the pen of the late editor of the *Surrogate*. He treats in a very ingenious and novel manner of intestate succession to personal property in the state of New York. Mr. Branch has solved the meaning of *multum in parvo*, for he has condensed, by means of signs and abbreviations, a surprising amount of information re-

lating to the estates of intestates, and those entitled to succeed thereto. We wish we had something like it in this province.

THE LAW SOCIETY OF MANITOBA.

Convocation of the Benchers.

HILARY TERM.

WINNIPEG, MONDAY, FEBRUARY 1, 1892.

Present: Mr. Isaac Campbell, Q.C., president; Mr. Alex. Haggart, secretary; Messrs. Aikins, Q.C., Kennedy, Q.C., Perdue and Cooper.

Report of the examining committee, dated 20th January, 1892, presented and read.

Ordered that the same be received and adopted.

Ordered that D. W. McKerchar be admitted as a student at law, and articled clerk.

Ordered that Mr. Geo. Patterson be called to the Bar.

Ordered that Mr. M. L. Grimmett be admitted as an attorney; and that the petition of Mr. T. L. Metcalf be granted.

Report from the examiners, dated 1st February, 1892, presented and read. Ordered that the same be received and adopted.

Ordered that J. E. Martin, be allowed his priminary examination, and that he be admitted as a student-at-law and articled clerk.

Ordered that W. Hart-McHarg be allowed the first intermediate examination.

Ordered that T. C. Elliott and T. L. Metcalf be allowed the second intermediate examination.

Ordered that Mr. G. Patterson be admitted as an attorney, and that Mr. H. H. Goulter be called to the Bar.

TUESDAY, FEBRUARY 2, 1892.

Present: Mr. Munson, treasurer; Mr. Haggart, secretary; Messrs. Aikins, Q.C., Kennedy, Q.C., Perdue, Richards and Nugent.

In the absence of the president the treasurer took the chair.

The minutes of the meeting held on December 11th, 1891, and 1st February, 1892, were read and confirmed.

Two communications from H. L. Adolph, dated January 4 and 29, 1892, read and considered.

Ordered that the Secretary write him that the Society cannot make any exception to the printed curriculum, in his favour, as he requested.

Letters from R. H. Winters, re Boultbee, dated 16 January, 1892, read, and

Ordered to be filed.

Letter read from the Carswell Co., dated 26th January, 1892, requesting that two copies of vol. 5 of the Manitoba Reports be sent them.

Ordered that the question of reprinting vol. 5, Manitoba Reports, be referred to the reporting committee.

Letter read from V. A. Long, dated 29th January, 1892, with reference to painting a portrait of the late Hon. A. Morris at present.

Ordered that the Secretary write him that it is not the intention of the Benchers to paint a portrait of Hon. A. Morris at present.

Letter read from Mr. Ghent Davis, dated the 2nd February, 1892, with regard to the law reporting.

Ordered that same be referred to reporting committee.

Letter read from Mr. F. C. Wade enclosing the rule of Court striking off R. L. Ashbaugh's name from the Attorney's roll, and the rule dismissing his appeal to the Full Court.

Ordered that the Secretary be requested to attend in court, and have Ashbaugh's name struck off the Attorney's roll.

Ordered that the Secretary be requested to apply to the court to strike off the rolls the names of those members set out in the schedule to by-law 19.

Ordered that it be referred to the committee on Legislation to consider the question of amending the Law Society's Act so as to provide that if a barrister be struck off the roll, he should also be struck off the attorney's roll ; and if an attorney be struck off the roll, he should also be struck off the barrister's roll ;

And that the committee be requested to consider the question of the admission in Manitoba of advocates from the N. W. T.

The treasurer presented his statement from 5th May to 31st Dec., 1891. Ordered that the treasurer's statement for the year 1891 be referred to the auditors, and that Messrs. Bearisto and Macleod be appointed auditors.

On motion for the third reading of the by-law to strike certain members off the rolls for non-payment of fees, a letter was read requesting a postponement on behalf of Mr. J. J. Conacher.

Ordered that the third reading of the by-law stand for the next meeting.

Ordered that the Society approve of the action of the Secretary in the matter of his correspondence with the Att'y-General, with regard to an alleged infringment of the Real Property Act in the Land Titles Office.

Ordered that Messrs. Munson, Aikins, Perdue, Campbell and Haggart be a committee to arrange with the Judges of the Queen's Bench to form a joint delegation to wait upon and interview the local Government with a view to increasing the Court House accommodation.

FRIDAY, FEBRUARY 12, 1892.

Present: Mr. Isaac Campbell. Q.C., president; Mr. Haggart, secretary; Messrs. Aikins, Q.C., Kennedy, Q.C., Nugent and Perdue.

The president took the chair.

The minutes of last meeting were read and confirmed.

Report presented from the auditors certifying that they had examined the books and accounts of the treasurer for the year 1891, and found the same correct.

Ordered that the report be received and adopted, and that the treasurer's statement for the year 1891 be printed and distributed amongst the members.

Report presented from the reporting committee, dated the 9th of February, 1892, with regard to printing vol. 8 of Manitoba Reports, and reprinting vol. 5 of Manitoba Reports. Moved and seconded that the report be adopted.

Moved in amendment and seconded that the first clause of the report recommending the acceptance of the tender of R. D. Richardson for printing vol. 8 M. R., be adopted, and that the consideration of the second clause as to a reprint of vol. 5, be allowed to stand over.

The amendment carried.

Ordered that the third reading of the by-law to strike certain members off the rolls for non-payment of fees, stand until next term.

Ordered that Mr. Richards and Mr. Cumberland be appointed to act as scrutineers at the next election of Benchers. Ordered that Mr. Perdue act as treasurer at the next election, in case the treasurer be absent.

The secretary presented a certified list of voters.

Ordered that the list presented be the list of voters entitled to vote at the next election.

Ordered that the secretary be requested to have printed all the papers necessary for the election.

Ordered that when any changes are made in the curriculum, that the subjects of the primary examination be assimilated as far as possible with those of the previous examination in the University of Manitoba.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. MARCH, 1892. No. 3.

DE PRÆSENTI.

FREEDOM FROM CRIME.

At the assize which was held by the Honourable Chief Justice in this city last Autumn, he took occasion to remark on the number of serious offences which were on the docket before him.

It is pleasant to think that since that time an almost unexampled era of good behaviour has set in, and it seems incredible, but none the less true, that *not one case* arising out of a crime committed since the above date has come up for trial at the assizes in all three districts of this province, and there has been no necessity to summon the grand jury. At Brandon and Portage la Prairie it was the pleasant duty of the respective sheriffs to present white gloves to the presiding judge, and the only criminal case tried in Winnipeg was one which was stood over from last assize. Commitments under the Speedy Trials Act have been exceedingly few, in fact only three, and the offences of a very venial character.

So far, so good ; but while this speaks volumes for the morals of Manitobans, yet we regret, deeply regret, that

the spirit of litigation, which ought to actuate all good citizens to battle for their rights—and if they have no rights, then for the rights which they think they ought to have, or privileges at any rate—languishes in a manner that is truly deplorable. As an evidence of this lamentable falling-off we turn to the civil list of the March Assize and find that it resembles the tragic state of affairs depicted in the deathless ode of the "Walrus and the Carpenter":

> "No birds were flying overhead—
> There were no birds to fly."

Which may be paraphrased thus:

> "No suits shrewd counsel *tried* to win—
> There were no suits to try."

THE LAW SOCIETY'S FINANCES.

The statement of revenue and expenditure of the Law Society for 1891 has been issued to its members. It is got up in the time-honoured hugger-mugger fashion by which you are enabled to extract from it the least possible amount of information in the longest possible space of time. It should be so arranged, at least it is only reasonable to suppose so, that the revenue and expenditure could be ascertained at first glance, but this result is shrouded in mystery and entails some figuring on the part of the eager enquirer. However, we are thankful for one thing, and that is that the amount expended, and well expended, for the portrait of the Chief Justice has been properly charged up to capital account, and there is now to the credit of special account the handsome sum of $19,500. The general account is overdrawn to a trifling extent, $44.58.

The profession cannot be charged with endeavouring to shield erring attorneys. A recent prosecution has cost no less than $850.67, of which $559.11 has been paid to Mr. Fred. Wade and $291.56 to Messrs. Archibald,

Howell and Cumberland. We cannot truthfully say that the result of this prosecution has been very successful or satisfactory, for owing to the point as to disbarring the delinquent attorney as a barrister having been overlooked and not raised at the proper time † the court in Term refused to allow it to be argued, and the attorney is still on the roll of barristers—a most regrettable state of affairs.

THE ELECTION OF BENCHERS.

The time approaches for the triennial election of gentlemen to fill the important positions of benchers of the Law Society of Manitoba. We have nothing to say in regard to the selection except that the bar should be very careful in their choice, and elect only those whom they think have the best interests of the profession at heart, and who are prepared to take active steps to promote the welfare of the Society.

Those benchers who have worked faithfully and constantly are entitled to re-election, and we feel sure that they will be elected, but on the other hand there is no question but that it is not in the best interests of the Society that some of the present representatives should be returned to office.

The junior bar should not let this chance go by of electing at least two of their number who are in full accord and sympathy with them, and in whom they may have full confidence.

POLICE COURT PROSECUTORS.

We are glad to learn that Mr. Joseph Wolf, J.P., the Magistrate presiding at the Police Court in this City on the tenth inst., took occasion to administer a severe and very fitting rebuke to the parties before him in an assault case, which had attracted some little attention because of

† *Vide* judgment of Killam, J., *Re Ashbaugh*, 2 W. L. T. at page 83.

peculiar circumstances connected with it. When the case was called the previous day the prosecutor did not appear, but handed in a written statement to the effect that the matter had been settled out of court. The Magistrate very properly refused to accept such a document and adjourned the case to the following day, the tenth, after issuing a subpœna to compel the attendance of the parties. When they appeared before him he told them in plain language that proceedings of that nature would not be tolerated, that parties must either keep out of court or have the matters complained of ajudicated upon by the Magistrate according to law, and that the improper practice of laying informations and withdrawing the charges under suspicious circumstances must be stopped, as he would not allow the court to be used as a vehicle to attain such ends.

Strangely enough the Magistrate who presided over the Police Court in Toronto made use of similar language the following day, but expressed himself in even stronger terms.

We are heartily glad that this course has been decided on. Thanks to a most capable Chief of Police and efficient staff, the city is remarkably free from crime, and for that very reason when cases do come up for trial, care should be taken that justice is strictly administered and no such solemn farces allowed to be acted as one a few weeks ago where a charge of perjury against a prisoner was withdrawn, and then *a statutory declaration* of the accused was read to the court in which the recently liberated prisoner *swore that he had lied when laying an information* on which the present prosecutor had founded the charge against him. The brazen perjurer then left the court without the slightest objection on the part of any one. This seems beyond belief, it is nevertheless a fact, and a reproach to the administration of justice. The Attorney-General's Department ought to inquire into this affair.

THE LOAVES AND FISHES.

As the legal profession, like the public, always takes a great interest in those of its members who are supposed to flourish under the refreshing dew of government patronage, we give a list of such gentlemen taken from the Government returns, and hope they will all be on again next year —and ourselves also :

1891.

Attorney-General's department	$5,635 16
H. H. Goulter	10 00
Allen and Cameron	881 68
Fred. C. Wade	492 85
J. H. Haverson	5 00
Mulock and Robarts	40 00
Munro, West and Mathers	1,456 35
Archibald & Howell	875 40
A. M. Peterson	456 90
Burke Corbett—extradition	155 20
Smith Curtis	92 85
W. F. Ellis	10 00
Gormully and Sinclair	959 00
Henderson and Matheson	283 14
A. A. McClellan	15 00
D. A. McDonald	120 50
J. B. McLaren	312 08
Chris. Robinson, Q. C	500 00
Perdue and Robinson	1,038 50
O. H. Clark	153 00
	$13,492 61

In regard to the above, we wish all scoffers and sceptics to understand that though some of the above gentlemen are undoubtedly patriots, yet we have it on the best authority that the terms "patronage" and "patriot" though symphonious, are by no means synonymous.

THE MICHIGAN LAW JOURNAL.

The latest addition to our exchange list is the *Michigan Law Journal*, published by the law department of the University of Michigan, Ann Arbor, Michigan, and edited by Messrs. J. E. Roberts, Eli R. Sutton and others. So

far as we are able to judge from the second number, which is the one we have received, the success of our newest contemporary is assured. Its get up it is evidently modeled after the *Harvard Law Review*, which journal is superior in type, paper, and general good taste to all other legal periodicals.

FLOTSAM AND JETSAM.

THE SALE OF FORT DOUGLAS.

Much interest naturally attaches to this early seat of the Governors of Assiniboia, and it is a matter of regret that even its site has crumbled away into the muddy and ever encroaching waters of Red River. Perhaps it is for the very reason that it exists in history only that any additional details concerning the wooden fortress which bore the family name of the noble Earl who caused its erection are welcomed by the public. Our thanks are due to Alexander Logan, Esq., of this city, for a copy of the following unique document which evidences the sale of the Fort and colony mill to his father, Robert Logan, long time Sheriff of Assiniboia, Councillor of that District, and Justice of the Peace for the same, all appointments of the Hudson's Bay Company. Mr. Alexander Logan resides on this property in the old family homestead built by his father, and the gap in the banks of the river, where once stood Fort Douglas, is plainly visible from his windows.

AN AGREEMENT made this eleventh day of June, one thousand eight hundred and twenty-five, between Robert Logan, of Red River settlement, of the one part, and the Executors of the late Thomas, Earl of Selkirk, by Governor Pelly, their agent, of the other part, as follows :

The said Robert Logan hereby agrees to purchase from the said Executors of the late Thomas Earl of Selkirk, the wind grist-mill now

being erected, with the old establishment of Fort Douglas comprising one hundred acres of land, for the sum of four hundred pounds sterling, payable as follows, viz : one hundred and fifty pounds on or before the 1st June, 1826 ; one hundred and fifty pounds on or before the 1st June, 1827, and one hundred pounds on or before the 1st June, 1828. And the said Robert Logan further agrees to grind any grain or pulse that may be brought to the said mill from settlers or others at a moulter not exceeding that which is established in Canada, to be determined by the Gentlemen of the Catholic Mission. It being well understood that the said mill shall be put into the possession of the said Robert Logan in a complete and finished state.

In witness whereof the said parties have hereunto set their hands this 9th day of July, 1825.

Witness, { D. McKenzie. Fras. Heron. (Sd.) ROBT. LOGAN. (Sd.) R. P. PELLY.

It is further agreed between Governor Pelly and Mr. Logan that from the period of the mills being delivered up to Mr. Logan, Mr. Mitchell shall be transferred to him until the expiration of his present contract, which takes place on the 1st of June, 1826, for which consideration Mr. Logan shall shall pay the one half of Mr. Mitchell's expenses to the estate of the late Earl of Selkirk from the time the mill is delivered until the first of June aforesaid.

Witnesses, { (Sd.) D. McKenzie. (Sd.) Fras. Heron. (Sd.) ROBT. LOGAN. (Sd.) R. P. PELLY.

9th June, 1825.

It is further understood that the charge or moulter for grinding shall be 10 per cent., *i. e.*, if ten bushels are ground, one bushel shall be the allowance for the mill.

(Sd.) GEO. SIMPSON,

9th March, 1827. Fort Garry.

THE SHERIFFS OF ASSINIBOIA.

In our second article on the above subject—*vide* vol. 2, p. 4—we stated that we were unable to ascertain who was the Sheriff of Assiniboia that succeeded William Kempt,* who was appointed October 21, 1823. From information we have lately received from J. W. Taylor, Esq., U. S. Consul, of this city, we believe that Mr. Robert Logan, referred to in our preceding article, is the mis-

*We find from papers in possession of Alex. Logan, Esq., that the name is so spelt, not "Kemp."

sing man, and this view is borne out by the following letter from the Earl of Selkirk, which is now in possession of Mr. Alexander Logan, to whom we are indebted for the privilege of publishing it.

PRIVATE.

ALEX. McDONALD, ESQ.,
SHERIFF OF OSSINIBOIA, &c., &c.,
YORK FACTORY,
OR ELSEWHERE. (*Sic.*)

LONDON, MAY 20th, 1819.

DEAR SIR,—

In my letters of Novr. 9 and Febry. 25 I acknowledged yours of Aug. 30 and Septr. 13. Having concerted with the Directors of the H. B. Co. to allow Mr. Logan to go to the settlement in your place, I trust that he has relieved you, so as to admit of your revisiting your family according to your anxious desire. My letters of Feb. 25th would inform you of my anxiety on account of the schemes of the N. W. Co. to arrest Captain Matthey in order to break up the settlement again, which leads me to regret the necessity of your coming away at such a crisis, but necessity has no law.

I think it is probable that this may meet you at York Factory on your way home. You will observe among the letters for Red River one addressed to the officer in charge, which you will read and forward; and I request your attention to the different persons and things that are to be forwarded. I am dear sir,

Yours, &c.,
(Sd.) SELKIRK.

P. S.—I do not recollect whether I desired you to give Mr. Logan copies or extracts of my letters to you, so as to put him in full possession of my instructions relative to the management of the settlement. If that has not already been attended to I trust that you will send such extracts now by the boats that go from York Factory to Red River.

The state of my health has not allowed me to write to all those whose letters I have to acknowledge. Be so good as to make my apology to Mr. Thomas, senr., Mr. Graham, Mr. McPherson and Mr. Archibald McDonald, also to Mr. Michael McDonell if he is within reach.

Mr. Graham proposed to send some flags and medals to the Scioux which could not be properly done now that the late treaty has thrown their country within the American lines.

It is not unreasonable to suppose that Mr. Logan retained the office till Mr. Alex. Ross was appointed, but

this date is also uncertain, for though Mr. Ross came to Red River in July, 1825, we do not know when he was appointed sheriff, but we *do* know that he held that office as early as Feb. 12, 1835. See prior articles.

In our brief sketch of the life of Sheriff James Ross, son of Alexander, we omitted to mention that he was called to the bar of this Province on May 8, 1871, and that his name stands third on the official list given in volume 1, page 147.

NEGRO COLONIAL JUDGES.

We take the following from the Toronto *Mail* :—

Two negroes have attained to judgeships in British colonies. One, Joseph Renner Maxwell, is chief judicial officer at the Gambia, in Africa, and oddly enough he has written a work upon the negro question in which he speaks with apparent horror of the most striking outward peculiarities of his race, and urges as the only method of elevating the negro the future miscegenation with other races. The other negro judge is Sir W. C. Reeves, chief justice of Barbadoes, in the British West Indies. He presides over the Supreme Court, and there are on the island seven Police Magistrates of subordinate jurisdiction.

BRIEFS.

MR. FREDERICK C. WADE has been appointed guardian *ad litem*, *vice* Mr. John D. Cameron, resigned.

THE CIRCUS poster advertisement of Fetherstonhaugh & Co., of Toronto, *patent barristers* (?), electrical experts and other traders, which graces the cover of the *Canada Law Journal*, has become famous even in India, as the *Indian Jurist* has given the firm a free notice in its last issue to hand. Our Ontario contemporaries rail editorially, periodically and spasmodically, on this professional evil, but it appears that they cannot withstand the seductive blandishments of the profits of their advertising column, and, flinging consistency to the winds, eagerly accept their little fee, and apply the pecuniary salve to their editorial mortifications.

IN REFERRING to the case of *Bently* v. *Morris* in our last issue we remarked that "it would almost seem" that a transfer could be registered in the N.-W. Territories without the production of the certificate of title. A further consideration of the case and the statute referred to leads us to restrict our remarks to the case of a mortgage, as the language used by the learned judge is not broad enough to place upon it even the very careful and guarded construction we did. The case is a very important one and we are anxious not to mislead our readers in the slightest degree.

WE HAVE been requested to state our opinion on the recent reported retainer of several members of the legal profession to obstruct a bill regarding the electric railway now before the Legislature. We must decline to express an opinion, as these gentlemen, with one or two exceptions,

are manifestly not retained as parliamentary counsel, but as lobbyists pure and simple, and because of the "influence" they have, or are supposed to have, with certain members of the Legislature. With such, employed as they are as politicians, not as counsel, a legal journal has nothing to do. The subject is not an attractive one and we gladly leave it to the lay press.

IT REALLY is time that a catalogue of the Law Society's Library was issued. Even a rough list of text books would be of great assistance to the profession, who are tired of the mutilated book-seller's list tied to a string and nailed to the wall, which at present disgraces the library. The libraries of the Counties of Wentworth and York, neither of them nearly so large or old as our own, have excellent catalogues. Who is to blame in the matter?

IN OUR report of the case of *Regina* v. *Lacoursiere*, Reports, p. 34, we stated that Mr. Delaronde was not an articled clerk. Our information was derived from a source which warranted the statement, but we have since ascertained that this gentleman is under articles to Mr. Pendergast, M.P.P.

THE LAST number of the *Green Bag* has an excellent portrait and sketch of the celebrated counsel, Sir Charles Russell, who is, taking all in all, the foremost advocate of the day. Sir Charles, like so many other distinguished lawyers, is an Irishman.

WE HAVE received a catalogue from a bookseller in England addressed to us at

WINNIPEG,
Mass., U.S.A. (?)

It is undoubtedly a great advantage for a city to have a distinctive name, even if ugly.

REVIEWS.

A MANUAL of County Court Practice in Ontario comprising the statutes and rules relating to the powers and duties of County Court Judges, and the jurisdiction, procedure and practice of the County and District courts of the Province of Ontario, and in appeals therefrom to the Court of Appeal, with decisions in Ontario, Nova Scotia, New Brunswick, Manitoba and England, and the County Court tariff. By M. J. Gorman, L. L. B., of Osgoode Hall, Barrister-at-law. Toronto, The Carswell Co. (Ltd.), 1890.

While Mr. Gorman's book will be of greater use in Ontario than in this province, mainly owing to the change of procedure relating to appeals, yet it will none the less prove of much assistance to the Manitoba bar. The annotations are terse and to the point, and the cases appear in general to be up to date, though the author might have consulted this journal to advantage so far as regards the cases of this province. The Manual deserves support, which we heartily trust will be given it. Typographically the book is very good, and it is moreover neatly bound. The index appears to be specially good, a very commendable feature. Mr. Gorman is to be congratulated on the result of his labours.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. APRIL, 1892. No. 4.

DE PRÆSENTI.

AN EXTRAORDINARY AFFAIR.

Novelists are often accused of founding their tales on improbable and fantastic plots. We believe they can plead "not guilty" to the charge. If we are asked our reasons, we reply, read the following plain statement of facts and then confess that you have to admit the possibility of the wildest conceits.

A year ago a farmer residing at Rathwell, in this province, became tired of communing in the solitude of the treeless prairies with the gophers, the mosquitoes and the early frosts, and concluded to get a wife to chop wood, stand off machine agents, scare away tramps, perform statute labour and attend to other light "chores" incidental to life in a new country. Through the seductive influence of a matrimonial agent he, after an exchange of photographs, found a damsel from London, Ontario, willing to throw in her lot with his, and they were duly married in this city on the 24th July last. Whether the lady proved equal to the little domestic duties above enumerated we do not know, but certain it is that owing to the kindly

intervention of a gay Lothario in the person of the partner of the aforesaid "granger", one Frederick Dale, the social relations of the triumvirate became slightly mixed, and at a solemn conference which was held between the interested parties, it became apparent that the "lord of the manor" was regarded rather in the light of an obstacle than a husband. He proved to be very accomodating, however, and it was resolved to annul the first marriage by simply restoring the wedding ring to the husband and burning the marriage certificate, which was immediately done. After this divorce *a mensa et thoro*, the foreclosed partner of her joys bestowed the blushing bride upon the devoted farm-hand, who, we are glad to say, even in the midst of these very trying and agitating circumstances yet retained sufficient presence of mind to buy back the wedding ring, (at a big discount doubtless) from the prior owner of the legal estate, who evidently heartily appreciated this delicate attention in relieving him of "dead stock," for he gaily drove the bridal party down to the station where they took the train for Winnipeg. Saying nothing about the slight irregularity of these proceedings, they went as spinster and bachelor before an unsuspecting minister of the gospel, who proceeded to make the bridegroom a husband and the bride a wife *de novo*.

To cut a long story short the lynx-eyed minions of the law, with a most shameful lack of sentiment, swooped down on the turtle-doves and haled the much-married lady before a magistrate who sent her up for trial to the Queen's Bench. The lovers, however, succeeded in convincing the Crown Prosecutor that they had acted in perfect good faith and in entire ignorance of the law, however incredible it may appear in these *fin de siècle* times, but as it proved that the unhappy woman was about to become a mother, the Hon. Mr. Justice Bain, before whom the matter was tried on the 13th instant, ordered that she

should be liberated, to come up for sentence when called upon.

THE PROHIBITIONISTS AND THE PLEBISCITE.

A very strange bill has just passed its second reading in our Local Legislature. It is entitled a "Bill to enable the electors of Manitoba to register their votes (at the coming general elections) upon the advisability of the introduction of a law totally prohibiting the importation, manufacture and sale of intoxicating liquor into or in the Province of Manitoba."

The greatest doubts exist as to the constitutionality of this measure, both as regards the reference to the people and the jurisdiction to enforce the act. The fact that a plebiscite is unknown in English history is the very strongest argument against it, not, as some have stated, that provided there is nothing against it the inference is that the Legislature has the right to adopt such a proceeding, the result of which is to instruct the law-givers of the province to pass certain legislation. The bill will apparently be allowed to pass with the idea of getting the opinion of the people first, and then inquiring into the jurisdiction of the province afterwards. This, we submit, is a totally wrong principal of legislation and a pernicious one upon which to proceed. We believe it will be productive of serious complications hereafter. First let our legislators satisify themselves that they are acting constitutionally, then let them proceed to carry out their lawful enactments.

ADDITIONS TO THE COURT HOUSE.

It looks as though additions were about to be made to the present court house, as the sum of $25,000 has been set apart by the Government for that purpose. No doubt increased accommodation is much needed, as there should be more room for the judges, including a conference room,

and the gloomy dungeon in the basement which is at present devoted to the uses of the bar should be utilized as a store-room for firewood, as originally intended; or better still, it might be converted into a vault and reserved as a place in which to bury the architect who designed so ill-planned a building, whenever he shall be gathered to his fathers and his mothers-in-law. We have always thought, and still think, that as the situation of the court house is so inconvenient, the judges should two years ago have co-operated with the bar in endeavouring to procure a building down town, and we think this could have been done, and the present court house used for some other purpose. However, a delay of two years has resulted in nothing, and as we are positively assured that the Government will not buy another site (certainly the Law Society will not—the profession has put itself on record on that point unmistakably), we think that further opposition would be contumacious.

AN UNWARRANTED ATTACK.

During the debate on the estimates a most unwarranted attack was made on Mr. H. A. McLean, chief clerk in the Attorney General's Department. When we say that it was characterized by vulgarity, personal abuse and untruthfulness, it becomes unnecessary to state that the author of it was Mr. A. F. Martin, the notorious member for Morris. This is the gifted *un*licensed conveyancer, who, some little while ago, gave evidence of his fitness to criticize things legal, by conveying an unfortunate man's farm to the wrong party for the cheap, nasty and unlawful charge of *one dollar!* However, Mr. Martin's spiteful and malicious assault has proved to be a veritable boomerang, as it gave the Ministry, and every barrister in the House, an opportunity to publicly testify to the high opinion they entertained of the chief clerk's ability. The Hon. (?) Member was

forced practically to apologize for this contemptible action which, we are glad to say, received no support from the rest of the Opposition.

FORMALITY IN U. S. COURTS.

Those who are of the opinion that there is a lack of proper formality in the higher courts of the United States are quite mistaken. The *Chicago Legal News* for the 2nd instant has an excellent reproduction of a photograph taken of the three imposing judges who form the Bench of the United States Court of Appeals for the Seventh Circuit, which was opened at Chicago, October 5th, 1891. This was the first occasion on which robes were worn by judges of any court in Illinois. We learn that the judges entered "with the greatest dignity, clothed in their judicial gowns, and all present arose with one accord to do them honour." The crier announced "The Honourable Judges of the Court of Appeals for the Seventh Judicial District!" and "the judges standing before the bench bowed to those present whereupon the spectators returned the bow with the greatest solemnity." Having seated themselves the crier proclaimed, "Oyez! Oyez! Oyez! All persons having business with this Honourable Court are admonished to draw near. God save the United States and this Honourable Court!"

The courteous salutation of these eminent judges is something that might be copied with advantage by our judiciary on similar occasions.

FLOTSAM AND JETSAM.

AH SIN AND THE LAND OF THE FREE (?)

The House of Representatives on Monday passed by a very large majority the so-called Geary bill, a most stringent measure for the exclusion of the Chinese. How severe the restrictions of the measure are will be seen from a summary of its provisions. The bill absolutely prohibits any Chinese, whether or not subjects of China (excepting diplomatic and consular officers and servants), from entering the United States; prohibits Chinese who may hereafter leave the United States from returning to this country; provides for a fine of $500 and imprisonment of one year in the case of the master of a vessel who knowingly lands any Chinese; requires the production of official credentials by diplomatic and consular officers before they can enter the United States; authorizes collectors of customs and deputies to take testimony relative to the identification of Chinese, and provides for the punishment of perjury; makes liable to forfeiture to the United States any vessel whose master knowingly violates the act; makes subject to a fine of $1,000 and imprisonment for one year any person who knowingly abets in bringing Chinese into the United States by land or water; makes liable to arrest upon warrant issued by any justice, judge or United States commissioner, Chinese or persons of Chinese descent entering the United States by crossing its boundary lines or found unlawfully in the United Sates, and provides for the punishment of the Chinese by imprisonment not exceeding five years and subsequent removal from the United States to the country whence they came, provided, that when they come to the United States from China by way of contiguous foreign territory they shall be returned to China.

This is not all, however. The bill is made to apply to subjects of China and all Chinese, even if subjects of any other foreign power, though it allows the Secretary of the Treasury to admit Chinese other than laborers or artisans to temporarily visit the United States under such rules as he may prescribe. Furthermore, the bill prohibits the admission of Chinese to citizenship; imposes a fine of $1,000 and the penalty of imprisonment for one year upon persons violating any part of the act; authorizes the collectors of customs to find who are and who are not Chinese, making their decision reviewable only by the Secretary of the Treasury, and during the determination of such questions and pending *habeas corpus* proceedings leaving the persons in whose behalf writs are issued in the custody of the collector; requires the Chinese now within

the United States to apply to the Commissioners of Internal Revenue of their respective districts for a certificate of residence under the same penalties as are otherwise prescribed; authorizes the Secretary of the Treasury to make rules for the issue of certificates; requires the certificate to contain a photograph of the applicant, with full description, and imposes a licence fee of $3 for its issue, the funds so collected being intended to defray the expenses of enforcing the act. Finally the bill repeals all acts inconsistent with it, and abrogates, sets aside and repeals the provisions of all treaties now in force between the United States and China which may conflict with its provisions.

This is a piece of hasty and uncritical legislation. There is a very general agreement of opinion as to the necessity of restricting Chinese immigration, and reasonable legislation having that end in view will meet with the public support. But the measure which has passed the House is much more than a measure of restriction; it is in fact a measure of prohibition, except as far as the diplomatic and consular representatives of China are concerned. Moreover, as has been pointed out by Mr. Hitt of Illinois, one of the best informed members of the House in reference to matters connected with our foreign relations, the measure is in direct violation of some of the provisions of our treaties with China. The enactment of the law would carry with it the abrogation of those provisions. This would be dealing with the provisions of treaties in an unnecessarily arbitrary manner, and would reflect little credit upon our government, which would lose in dignity in the eyes of foreign nations. These are considerations which are more likely to be taken into account by the Senate than by the House, and they are considerations which should appeal strongly to the President if he should have occasion to pass upon the bill.—*Bradstreet's, N. Y., April 9, 1892.*

FACFTIÆ.

Congressman Mason of Chicago told a story of a somewhat remarkable experience he had not long ago on a one horse railway in the wild and woolly west.

"There was only one passenger car," he said, "and it was full. So was the conductor. At all events I thought so from the manner in which he addressed me concerning a valise my side.

'Take that thing into the baggage car,' he remarked, very peremptorily.

I looked at him somewhat surprised, and without making any response.

'Do you hear what I say?' he demanded.

'Yes, I do,' I answered.

He went away to collect some tickets. When he came back about ten minutes later he looked angry.

'I thought I told you to take that valise into the baggage car,' he yelled.

'I heard you,' I responded mildly.

'Then, why haven't you done it?'

'Because I don't propose to.'

'You don't, eh?'

'No, sir.'

'The hades you say,' he roared, 'I'd have you know that I'm the boss of this train, and I don't put up with impudence from no dudes. You snake that bag out of here right away or I'll chuck it through the window in just two minutes.'

At that moment we slowed up, approached a station, and the conductor went out on the platform. More passengers got aboard, and when he came back several persons were standing up in the aisle. I just sat still, wondering to have been called a dude for the first time in my life.

'What!' shouted the ticket puncher upon his return, 'You won't pay any attention to what I say, eh? Well, here goes!'

With that he picked up the valise and threw it out the car window. We were going at the rate of about fifteen miles an hour at the time. I said nothing, and a quarter of an hour later he came through again and spoke to me. Evidently he had been reflecting that possibly he had exceeded his authority.

'I wouldn't have done it,' he said, half apologetically, 'only you riled me, and discipline's gotter be maintained on board a train.'

'O, that's all right,' I replied with entire composure.

'Well, what are you going to do about it?' he asked.

'About what?'

'Why, the bag.'

'O, nothing,' I said.

'But weren't its contents valuable?'

'I don't know, I'm sure,' I responded.

'You don't know?'

'No,' I said; '*it wasn't my valise!*'

My dear boy you never saw a man so totally flabbergasted as that conductor was in all your born days. I got off at the next station and I haven't the slightest idea how he managed to fix things up with the owner of the bag, who had left it on the seat beside me while he went into the baggage car to smoke a cigar."—*Washington Star.*

In the beginning Mr. Theophilus L. Globster made a present of $25 worth of toys to the orphan asylum.

And *The Daily Bugle* credited the kind deed to Theodore Globster.

And *The Evening Radiator* gave the honour to Thomas Gloster.

And *The Semi-Weekly Eaglet* gave great praise to "our esteemed fellow-citizen, Mr. T. G. Lobster."

And it came to pass that Mr. Globster read the *Bugle*, the *Radiator* and the *Eaglet*, and saw what liberties had been taken with his hitherto untarnished name.

And in his righteous wrath and mortification he sought the illusory consolation of the bowl, and waxed uproarious and bellicose, until the law's minions were compelled to confine him for a time, and in due course he was adjudged of the cadi.

And the *Bugle*, the *Evening Radiator*, and even the *Semi-Weekly Eaglet*, announced with a unanimity of correctness: "Theophilus L. Globster, drunk and disorderly, $10.95."—*Indianapolis Journal.*

BRIEFS.

As our much respected contemporary the *American Law Review* passes some rather severe strictures on the Fee Bill of the Red River Bar Association, which was organized in 1880, we wish to say that this Association does not include all "the lawyers of the valley of the Red River of the North," but only those living on Uncle Sam's side of the International Boundary. We are not sure that we made this point very apparent in our note, vol. 2, page 194.

Mr. Joseph Henry Wrigley, of Lethbridge, Alberta, was enrolled an advocate of the North-West Territories on March 17, 1892.

The bill before the Ontario Legislature enabling women to practice law passed its second reading a few days ago by a majority of 1. The vote stood 41 to 40. The bar of Ontario ought to bestir themselves and see that the bill is defeated on the third reading. We think women out of place in the forum.

The annual election of benchers took place in British Columbia a few days ago with the same result as mentioned last year. We understand that our former fellow-citizen,

Mr. L. G. McPhillips, stood high on the list, second in fact. By the way, when are *we* going to have an annual election instead of a triennial ?

MR. E. P. DAVIS, formerly of this city, and latterly of Calgary, Alberta, has commenced the practice of his profession in Victoria, leaving his former place of residence because of the unsuitability of the climate to his health. The British Columbia bar will no doubt recognize Mr. Davis' abilities as speedily as did those of this Province and the North-West Territories.

WE have on our library table the first two issues of the *Law Library*, published by Sweet & Maxwell (Ltd.,) and devoted to the faithful noticing and reviewing of legal literature. The title page is adorned with a portrait of Sir William Blackstone, and the primary number contains a fac-simile receipt of the celebrated jurist's for the consideration for the assignment of his Commentaries, £1096–18–6.

WE regret that in reviewing Mr. Gorman's excellent County Court Practice in our last issue, we gave the date of publication as being 1890, instead of 1892.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. MAY, 1892. No. 5.

DE PRÆSENTI.

THE NEW BENCHERS.

At the election of benchers which took place on April 30, the following gentlemen were declared elected by the scrutineers for the ensuing term of three years, in the order given:

For the Eastern Judicial District—Messrs. Alexander Haggart, Isaac Campbell, Q. C., J. H. Munson, A. E. Richards, J. A. M. Aikins, Q. C., J. D. Cameron, W. E. Perdue, J. S. Ewart, Q. C., H. J. Macdonald, Q. C., M. P., and Heber Archibald.

For the Central Judicial District—Mr. W. J. Cooper.

For the Western Judicial District—Mr. T. M. Daly, Q. C., M. P.

At the first meeting of the benchers on Monday, 2nd inst., Mr. Isaac Campbell, Q. C., was elected president, Mr. Perdue treasurer, and Mr. Cameron secretary.

The new body is undoubtedly very representative, and we feel sure that the interests of the profession will be in good hands. At the same time we particularly regret that Mr. J. B. McLaren, of Morden, has been left off, and

we believe, from the many similar expressions that we have heard since the election, that it was merely owing to an oversight that he was not returned to office.

It may be of interest to know that out of a total of 120 barristers (three of whom were ineligible owing to default in fees) in this Province, only 82 voted.

The following committees were struck :

FINANCE :—Messrs. Macdonald, Q.C., Richards, Perdue, Munson, Cooper and Cameron.

LIBRARY :—Messrs. Aikins, Q.C., Ewart, Q.C., Haggart and Munson.

EXAMINATION :—Macdonald, Q.C., Archibald, Haggart, Cameron and Cooper.

DISCIPLINE :—Messrs. Aikins, Q.C., Ewart, Q.C., Archibald, Richards, Perdue, Cameron and Cooper.

REPORTING :—Messrs. Aikins, Q.C., Ewart, Q.C., Macdonald, Q.C., Haggart and Perdue.

LEGISLATION :—Messrs. Macdonald, Q.C., Daly, Q.C., Archibald, Haggart, Munson and Perdue.

AMENDMENTS TO THE LAW SOCIETY ACT.

The following is the text of the Act affecting the legal profession which was passed at the last session of the Legislature of this Province :

An Act to amend "The Law Society Act."

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Manitoba, enacts as follows :

1. Section 6 of Chapter 83 of the Revised Statutes of Manitoba is hereby amended by adding after the word "Manitoba" in the fourth line thereof the words "and every person who has been such Attorney-General, if resident in the Province and in the practice of his profession."

2. Paragraph (b) of Section 57 of Chapter 83, of The Revised Statutes of Manitoba, is hereby amended, by inserting after the word "Provinces," in the third line thereof, the words "or Territories."

(2.) That said paragraph (b) of said Section 57 be amended by striking out all the words from and including the word "entitled" in the ninth ne of said paragraph to and including the word "so" in the tenth line

of said paragraph, and by substituting for the said words so struck out the words "without any examination or any proof of service be so entitled."

3. Paragraph (b) of Section 65 of said Chapter, is hereby amended by inserting after the word "Provinces," in the second line thereof, the words "or Territories."

4. Section 77 of said Chapter is hereby repealed, and the following section substituted therefor:

77. It shall be lawful for the Court of Queen's Bench, upon rule nisi, to hear and determine any complaint that may be made against any member of the Law Society for unprofessional conduct or misconduct as a barrister, attorney or solicitor, and such member of the Law Society may, according to the gravity of the offence, and in the discretion of the said Court of Queen's Bench, be either suspended from practising law in any Court of this Province, or struck off both or either of the rolls, and disabled from practising either as an attorney or solicitor or as a barrister or in all of said capacities in any of the said Courts.

5. Notwithstanding anything to the contrary in any Act contained the election of Benchers of the Law Society of Manitoba, to be held in 1892, shall be held on Saturday the thirtieth day of April, 1892.

(2.) The votes shall be given by closed voting papers in the form in the schedule to "The Law Society Act," or to the like effect, being delivered to the Secretary of the Law Society, on Friday, the twenty-ninth day of April, 1892, or during the Wednesday or Thursday immediately preceding. Any voting papers received by the said Secretary by post during said days, or during the preceding week, shall be deemed duly delivered to him.

6. No petition against the return of any Bencher elected on the said date shall be entertained, unless such petition be filed with the Secretary of the Law Society during Easter Term, 1892. On any such notice being duly filed as aforesaid, the Benchers shall within one week after receiving such notice, appoint a day for the hearing of such petiton, and give notice of such petition, and give notice of such day to the petitioner and to the person whose return is disputed.

7. This Act shall come into force the day it is assented to.

THE PROFESSION AND LEGAL LITERATURE.

We cannot express any opinion as to the legal profession of other countries, but we do not think that the Canadian bar as a whole gives that support to legal literature which it ought. The barrister in Canada who devotes any part of his leisure time to legal literature will find that, in general, he addresses himself to an indifferent public, though he can console himself with the thought that he is in

good company, in that such is the complaint of all those who devote themselves to any branch literature in this country. The average Canadian can get up any required amount of patriotic enthusiasm at election time, and talk about "those Yankees" and "encourage home industries," and similar fairy tales, but when the time comes to put his hand in his trousers pocket and produce the green-backs he is simply "not in it."

We are moved to make these remarks, not because personally we have any complaint against our fellow members of the bar (as we must gratefully thank them for supporting us beyond our deserts), but in view of the fact that we were astonished to find from one of the members of the largest law-publishing house in Canada that they had no less than $10,000 worth of stock of that admirable series, the "London Law Monthly," on hand.

We are subscribers to this series and find it of the greatest value and assistance, and having the interests of legal literature at heart and consequently a fellow feeling, we very much regret to hear that the publishers have arrived at the conclusion that unless an immediate and more hearty support be accorded them they will be forced to discontinue publication.

We think that such a state of affairs is a sufficient justification of our remarks and we sincerely trust that the profession will rouse itself from its apathy and not be left to make the discovery, when too late, that it should have fostered, and not let die, an enterprise which has furnished it with the best text books at the lowest prices.

APPEALS TO THE PRIVY COUNCIL.

The *Canada Gazette* for the 30th ult., contains an Imperial order-in-council, regulating appeals from the Queen's Bench of this Province to the Privy Council. It is as follows:

AT THE COURT AT WINDSOR,

The 16th day of March, 1892.

PRESENT:

The QUEEN'S Most Excellent Majesty.
Lord President,
Duke of Rutland,
Marquess of Salisbury,
Lord Chamberlain.

Whereas by an Act of the Parliament of Manitoba passed in the 48th year of Her Majesty's reign, chapter 48, entitled "An Act respecting the Court of Queen's Bench," it was enacted that Her Majesty's Court of Queen's Bench for Manitoba should exist and continue under the name and style of "Her Majesty's Court of Queen's Bench for Manitoba," and that it was and should continue to be a court of original and appellate jurisdiction, and should possess and exercise all such powers and authorities as by the laws of England are incident to a Superior Court of Record of civil and criminal jurisdiction, in all matters civil and criminal whatsoever, but no provision has yet been made for the prosecution and regulation of appeals to Her Majesty in Council from the said Court;

And whereas it is expedient that provision should be made by this Order to enable parties to appeal from the decisions of the said Court to Her Majesty in Council, it is hereby ordered by the Queen's Most Excellent Majesty, by and with the advice of Her Privy Council, as follows:—

1. Any person or persons may appeal to Her Majesty, Her heirs and successors, in Her or their Privy Council, from any final judgment, decree, order, or sentence of the said Court of Queen's Bench of Manitoba, in such manner, within such time, and under and subject to such rules, regulations, and limitations as are hereinafter mentioned, that is to say:

In case any such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of three hundred pounds sterling (£300) or in case such judgment, decree, order or sentence shall involve directly or indirectly any claim, demand, or question to or respecting property or any civil right amounting to or of the value of three hundred pounds sterling (£300) the person or persons feeling aggrieved by any such judgment, decree, order, or sentence may, within fourteen days next after the same shall have been pronounced, made or given, apply to the said court by motion or petition for leave to appeal therefrom to Her Majesty, Her heirs and successors, in Her or their Privy Council;

In case such leave to appeal be prayed by the party or parties who is or are directed to pay any such sum of money or perform any duty, the said court may either direct that the judgment, decree, order, or sentence appealed from shall be carried into execution,

or that the execution thereof shall be suspended pending the said appeal, as to the said court may appear to be most consistent with real and substantial justice;

And in case the said court shall direct such judgment, decree, order, or sentence to be carried into execution, the person or persons in whose favour the same shall be given shall, before the execution thereof, enter into good and sufficient security to be approved by the said court for the due performance of such order as Her Majesty, Her heirs and successors, shall think fit to make upon such appeal;

In all cases security shall also be given by the party or parties appellant in a bond or mortgage or personal recognizance not exceeding the value of five hundred pounds sterling (£500) for the prosecution of the appeal, and the payment of all such costs as may be awarded by Her Majesty, Her heirs and successors, or by the Judicial Committee of Her Majesty's Privy Council, to the party or parties respondent; and if such last-mentioned security shall be entered into within three months from the date of such motion or petition for leave to appeal, then, and not otherwise, the said court shall admit the appeal and the party or parties appellant shall be at liberty to prefer and prosecute his, her, or their appeal to Her Majesty, Her heirs and successors, in Her or their Privy Council, in such manner and under such rules as are or may be observed in appeals made to Her Majesty from Her Majesty's Colonies and Plantations abroad.

2. It shall be lawful for the said Supreme Court at its discretion, on the motion or petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the said Supreme Court, to grant permission to such party to appeal against the same to Her Majesty, Her heirs and successors, in Her or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences.

3. Nothing herein contained doth or shall extend or be construed to extend to take away or abridge the undoubted right and authority of Her Majesty, Her heirs and successors, upon the humble petition of any person or persons aggrieved by any judgment or determination of the said court, at any time to admit his, her, or their appeal therefrom, upon such terms as Her Majesty, Her heirs or successors, shall think fit, and to reverse, correct, or vary such judgment or determination in such manner as to Her Majesty, Her heirs and successors, shall seem meet.

4. In all cases of appeal admitted by the said court, or by Her Majesty, Her heirs or successors, the said court shall certify and transmit to Her Majesty, Her heirs or successors, in Her or their Privy Council, a true and exact copy of all evidence, proceedings, judgments, decrees, and

orders had or made in such cases appealed so far as the same have relation to the matter of appeal, such copies to be certified under the seal of the said court, and the said court shall also certify and transmit to Her Majesty, Her heirs and successors, in Her or their Privy Council, a copy of the reasons given by the judges of such court, or by any of such judges for or against the judgment or determination appealed against, where such reasons shall have been given in writing, and where such reasons shall have been given orally, then a statement in writing of the reasons given by the judges of such court, or by any such judges, for or against the judgment or determination appealed against.

5. The said court shall, in all cases of appeal to Her Majesty, Her heirs or successors, conform to and execute or cause to be executed such judgments and orders as Her Majesty, Her heirs and successors, shall think fit to make in the premises, in such manner as any original judgment, decree, or decretal order, or other order or rule of the said court should or might have been executed.

And the Right Honorable Lord Knutsford, one of Her Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

C. L. PEEL.

There appears to be an error in the second of the above clauses, in which the expression "said Supreme Court" is twice used. Surely this must mean "said Superior Court."?

STRIKING ATTORNEY OFF ROLLS.

On the third day of Easter Term the Secretary of the Law Society pursuant to resolution of the Benchers, attended before the Full Court of Queen's Bench—the Hon. Chief Justice and the Hon. Messrs. Justices Dubuc and Killam—and made application that Roderick Leander Ashbaugh be struck off the rolls of attorneys of the said court, pursuant to rule of court theretofore made in that behalf. The court directed that the name of the attorney be struck off, which was accordingly done by the Assistant-Secretary.

OLD SETTLERS' CLAIMS.

The following important notice in regard to these claims appeared in the *Canadian Gazette* for April 23 ult.

NOTICE.

Claims of Half-breeds and Original White Settlers in North-West Territories.

Whereas by the Act 49 Victoria, chapter 54, sub-clause (*f*) of clause 90, Revised Statutes of Canada, it is provided that the Governor in Council shall have power to "grant lands in satisfaction of any claims existing in connection with the extinguishment of the Indian title, preferred by Half-breed resident in the North-West Territories, outside of the limits of Manitoba, previous to the 15th day of July, 1870, to such persons, to such extent, and on such terms and conditions as are deemed expedient";

And whereas by Order in Council dated the 30th March, 1885, and the several Orders in Council subsequently passed in that behalf under the authority of the said Act 49 Victoria, chapter 54, it is provided,—

1. That each Half-breed head of a family who was resident in that portion of the North-West Territories ceded by the Indians under treaty with the Government of Canada and outside of the limits of Manitoba, previous to the 15th day of July, 1870, shall receive, upon satisfactory evidence in support of his or her claim being furnished, an issue of $160 in scrip redeemable in Dominion lands;

2. That each child of a Half-breed head of a family, or of an Indian and white parents, who was unmarried and resident in the said portions of the North-West Territories ceded by the Indians under treaty and outside the limits of Manitoba, previous to the 15th July, 1870, and born before that date, shall receive at his or her option an issue of $240 in scrip redeemable in Dominion Lands, or a land scrip entitling such child to select 240 acres of land from any lands open for homestead entry;

And whereas by an Order in Council dated the 19th April, 1886, it is also provided that the persons known as "Original White Settlers," who went to any part of the North-West Territories in which the Indian title has been extinguished, between the years 1813 and 1835 both inclusive, or the children of such persons not being Half-breeds, born and living on the 26th day of May, 1874, and residing therein at that date, shall receive, upon satisfactory evidence in support of his or her claim being furnished, an issue of $160 in scrip redeemable in Dominion lands;

And whereas the Governor General in Council, in view of the fact that all such persons have had ample time and have been given every possible facility to submit the necessary evidence in support of their claims to participate in the grant of scrip or land aforesaid before the several Commissions at the sittings held by such Commissions at various points in the North-West Territories and Manitoba, or before the Commissioner of Dominion Lands or any Agent of Dominion Lands, has deemed it expedient by an Order in Council dated the 12th of March, 1892, to limit the time within which all claims of the nature above specified may be presented; therefore

Public notice is hereby given, that all claims of Half-breeds and Original White Settlers to land or scrip under the provisions of the said

hereinbefore recited Act and Orders in Council that are not filed with the Commissioner of Dominion Lands, an Agent of Dominion Lands, or such other person as may be duly authorized by the Minister of the Interior to receive them, on or before the 1st of May, 1894, together with the necessary proof, shall cease and determine.

By order,

(Sd.) JOHN R. HALL,
Secretary.

Department of the Interior,
Ottawa, 13th April, 1892.

"BARDELL v. PICKWICK."

Mr. Walter Rye, the antiquary, writes to the *Athenæum :*

"Frognal House, Hampstead, N. W.

Mr. Lockwood, Q. C., in his most amusing lecture on this trial, missed, as I think all former commentators have done, what seems to me a very important point.

All readers of Dickens, of the present generation, are very apt to think that the idea that the missive "Chops and tomato sauce" could possibly be strained into a love-letter is rather too absurd even for a burlesque. But the other day it struck me that at the time Dickens wrote the then scarce tomato was just as usually known as the "love-apple" as the "tomato." This supplies just enough possibility to enable plaintiff's counsel to found an innuendo, and I dare say many of the last generation of readers quite understood what is now a *crux* to many."

BRIEFS.

MR. THEOPHANE BERTRAND, of St. Boniface, an advocate of the Province of Quebec, was admitted as an attorney on the first day of this [Easter] Term.

MR. WILLIAM JAMES NELSON, of Moose Jaw, was enrolled an advocate of the North-West Territories on April 6 last, as was also Mr. Edward Lindsey Elwood, of Regina, on the following day.

THERE is a very instructive article on the U. S. Circuit Court of Appeals in the *American Law Review* for March-April.

WHO is responsible for the error in a recent issue of the *Manitoba Gazette* in which, in an order-in-council, all the county court judges are respectively referred to as "The *Honourable* Judge ———"?

THE *Irish Law Times* for April 16 last, has an interesting speech of the Lord Chancellor's on "Legal Administration," delivered at the annual banquet of the Birmingham Law Students' Society, of which he is President.

THE Ontario Legislature at the last session unanimously raised the salary of the Attorney-General from $5,000 to $7,000 per annum.

THE Bill introduced in the same House to enable women to practise law did not pass as introduced, and the matter was left in the hands of the Law Society, the benchers of which have already put themselves on record against the proposed change and refused to admit women as students-at-law.

MOVED thereto, by the balmy spring breezes of this western land, doubtless, we in March, page 24, indulged in a modest jokelet adapted from the "Walrus and the Carpenter," to fit the state of affairs of our Queen's Bench here. We see that our countryman and contemporary, the *Irish Law Times*, modestly appropriates (April 30th, page 230) our little rhyme, and fits it to its own Four Courts. Rash journal, to so serve a fellow editor and think to escape detection! You are indeed too bold, and were our friends the "Walrus and the Carpenter," to behold your temerity they might be again reduced to that watery state recorded by the annalist, wherein

"They wept like anything to see such quantities of *sand*!"

SPEAKING on the new Criminal Bill the Attorney-General of Canada stated that the use of the rather uncertain and variously defined words "malice" and "maliciously" had been abandoned, and (in answer to Mr. Laurier) that no word had been absolutely substituted for "malice," but more precise terms employed where necessary, and, as an instance, quoted the clause stating that homicide "might be culpable or not culpable. Culpable homicide is either murder or manslaughter. Homicide which is not culpable is not an offence."

REVIEWS.

THE EXCHEQUER COURT REPORTS—Vol. 2, No. 4.

This issue of the above reports has just been published and contains an appendix embracing all the important decisions respecting patents and trade-marks of the Department of Agriculture since 1869, including the case of *Barter* v. *Smith*, wherein will be found the opinion of Dr. Taché, D. M. A., on the important questions of manufacture in Canada and importation therein of patented inventions. This appendix will be of special value now that the jurisdiction of tho Exchequer Court has been extended to include such matters.

COMMENTARIES ON THE LAW of Sales and Collateral Subjects by Jeremiah Travis, L L. B., Harvard, '66, recently Judge of the Canadian North-West Territories; first-prize essayist of Harvard University of 1866; author of "A Treatise on Canadian Constitutional Law"; annotator of "Parsons on Partnership," etc., Boston: Little, Brown & Co.; London: Sweet & Maxwell (Ld.); Toronto: The Carswell Co. (Ld.); 2 vols. half calf, 8 vo., 1892.

This work is the most important legal one that that has been undertaken by a Canadian for many years, as such it demands special attention at our hands. The reader is apt to be prejudiced by the lamentable lack of good taste which is displayed in the introduction. The sweeping charges of "bad law" and "gross legal fallacies," there brought against distinguished tribunals may be, and doubtless are in some instances true, but at the same time it is to be regretted that the author could not have found more happy language in which to express his opinions, and it would

have been better had the *ci-devant* judge not referred to his career on the Territorial Bench.

We cannot dismiss this part of the work without a protest against the appearance in a sober legal work of "pow-wows," (*vide* p. x.) on the railroad or elsewhere, with "distinguished" or obscure lawyers, on great or small cases.

We see the dedication is to three professors of Harvard Law School, and they are each styled "Honorable." One gets so nauseated at the bestowal of this term on every legal pigmy in the United States that perhaps it is scarcely worth while inquiring why it is extended to legal professors who cannot surely be on the bench.

The work is divided into four books, the first of which treats of Sales, the second of Special Sales, the third of Railroads, and the fourth of the Statute of Frauds.

The author himself modestly states that it (the work) "is an absolutely new one on the subject; not a rehash of Blackburn, Benjamin, or any other writer . . Within its limits it is complete and thoroughly exhaustive," etc., and as he wrote the book the presumption is that he ought to know what it contains; the natural sequence of which is that as "it is complete and thoroughly exhaustive" any consideration of it by a reviewer would be superflous. The work all through is characterized by a boldness which is not by any means presumption, and its chief merit is a fearless discussion and criticism of judicial findings and a frank expression of the authors views, which features, as long as his language is temperate, are most commendable, but unfortunately it too often verges on the egotistic and pedantic. So much for the defects of the work; we are glad to say that its good points more than counterbalance them.

Too much praise can hardly be bestowed on the author for the copious notes which illustrate the text and evi-

dence laborious and faithful work, and he has not spared himself in his successful efforts to bring the book down to date by an elaborate consideration of English and American cases. His treatment of the principles of sales is in many instances novel and convincing, and his exposition of those principles is almost invariably lucid and precise.

The consideration of the Statute of Frauds in all its various aspects is perhaps the best feature and leaves little, if anything, to be desired. Book IV, on Railroads, we read with much profit to ourselves. An excellent analytical index deserves special notice, and, as practitioners know to their cost, a good index is a rare thing.

Mr. Travis deserves the support of the profession and we trust he will be afforded it.

THE LAW SOCIETY OF MANITOBA.

Convocation.

WINNIPEG, SATURDAY, APRIL 2ND, 1892.

Present: Mr. I. Campbell, Q. C., president; Mr. Alex. Haggart, secretary; Messrs. Aikins, Q. C., Kennedy, Q. C., Richards, Perdue and Cameron.

The president took the chair.

Ordered that the Law Society Act in the Revised Statutes be amended by providing that the election of Benchers for 1892 be held on the fourth Thursday in April, 1892, and that petitions against the return of any Bencher may be lodged at any time during Easter Term, 1892.

Ordered that the Law Society Act in the Revised Statutes be further amended to, in effect, provide that a barrister may be disbarred and struck off the rolls for unprofessional conduct or misconduct as a barrister, and that the practice as to the manner of striking an attorney off the rolls shall be applicable to disbar or strike a barrister off the Rolls.

Ordered that the said Act be further amended by providing for the admission of advocates from the North-West Territories.

Ordered that Messrs. Cameron, Perdue, Campbell and Aikins be appointed a committee to attend to this legislation.

Ordered that a committee consisting of the president, and Messrs. Richards, Perdue and Munson, be appointed to confer with the Government and ascertain under what conditions the Government would erect a Court House on a site more accessible to the profession and, if necessary, that the committee call a meeting of the Benchers to consider the matter.

Mr. Kennedy dissented.

[The report of the scrutineers for the election for Benchers is here embodied in the Minutes.]

EASTER TERM.

MONDAY, MAY 2ND, 1892.

Present: Mr. I. Campbell, Q. C., president; Mr. Haggart, Mr. Archibald, Mr. Cameron, Mr. Ewart, Mr. Perdue, Mr. Richards.

The president took the chair.

The reports of the scrutineers and the secretary containing the result of the recent election for Benchers were read.

The minutes of the meetings of 12th and 2nd April, 1892, were read and confirmed.

Letter from Mr. Allan Macdonald, dated 24th March, 1892, with regard to unlicensed conveyancers and other matters affecting the profession, read and considered.

Ordered that the secretary write him requesting him to furnish the names and particulars of the cases with respect to which he made complaint.

Letter from Mr. R. D. Richardson, dated April 27th, 1892, with regard to copyright in Volumes 1 and 2, Manitoba Law Reports, read and ordered to stand for consideration.

Report of the Examining Committee, dated 20th A· ril, 1892, received, read and adopted.

Ordered that C. E. Bastien and R. Goulet, jun., graduates, be admitted as students at law and articled clerks, and that the petitions of D. Forrester and E. W. Pearson for leave to take their examinations as of Easter Term be allowed.

Report from the examiners, dated 2nd May, 1892, received, read and adopted.

Ordered that A. C. Ewart and H. L. Adolph be admitted as students at law and articled clerks.

That F. S. Andrews, Donald Forrester and S. J. Rothwell be allowed the first intermediate examination.

That F. J. Sharpe be allowed the second intermediate examination.

That R. G. Macdonald be allowed his final examination for attorney, and that Theophane Bertrand be admitted as an attorney.

The election of officers for the ensuing year then took place.

The results of the ballots were declared to be as follows :—

For president—Mr. Isaac Campbell, Q. C.
For treasurer—Mr. W. E. Perdue.
For secretary—Mr. J. D. Cameron.

The following standing committees were elected. (See *ante* p. 46.)

On motion for the third reading reading of the by-law to strike certain members off the rolls for non-payment of fees, it was ordered that the same be withdrawan.

Ordered that the secretary be requested to attend in court and apply to have the name of R. L. Ashbaugh struck off the attorney's roll pursuant to the rule of court to that effect, and that he also apply to have struck off the rolls the names of those members mentioned in by-law 19.

The treasurer presented his statement from January 1 to May 2, 1892.

Ordered that Convocation meet on Wednesday, May 11, at 4 o'clock.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. JUNE, 1892. No. 6.

DE PRÆSENTI.

THE LAW REPORTS.

As will be seen from our minutes of the proceedings of the Law Society a change is contemplated in the conduct of the law reporting. The profession is not informed, as it ought to be, even by a written notice of motion however brief, as to what the proposed change is, but we understand that one of the benchers, at least, contemplates a reversion to the old system, practically, of having a member of the senior bar nominally revise (for an appreciable consideration) the reports, and the librarian do the work. This is not a good system. We all know how it worked, or failed to work, before. The reports are the only return the profession get for being taxed as members of the Law Society. The Society has ample funds to pay well for the proper reporting of cases, and at the same time is quite right in insisting that the work should be thoroughly done, for this the profession demand. The motto should be "good pay and faithful work," and the editing entrusted to some capable member of the junior bar, for it is justly regarded as their only

perquisite. Nor is there need for a member of the senior bar to act as editor, as in Ontario, where there is a number of reporters and it is necessary to have one man in authority over all to insure regularity and uniformity and answer to the benchers for any shortcomings. Whatever is done we do not hesitate to say, as the result of an extended enquiry among the members of the profession, that the above proposal is distasteful, and justly so.

JUDGES' CHAMBERS.

We have been asked by what authority judges' chambers are held on Monday and Thursday in each week, exclusive of vacation, and in what order do the judges sit? We are not aware of any rule of court on the point, and enquiry from the prothonotary and clerk in chambers elicits nothing further than that the judges have expressed an intention to, and do sit in chambers on those days, but there is no certainty of finding any particular judge in chambers during any particular week. This may be intentional on the part of the judges for various weighty reasons doubtless, but the old practice adopted, when they held what are now the referee's chambers, of sitting each a week in order of seniority, had its advantages.

While on this subject attention ought to be drawn to the fact that it would be an excellent thing if the judges would lay down a rule as to the conduct of cases before them on appeals from the referee by way of summons under order 97. The question is, who addresses the court first on such a summons? It ought, according to the practice on summonses, to be the party shewing cause, but to our knowledge one at least of the judges has directed the counsel for appellant to open, and further refused to lay down a rule governing this point when requested to do so. The matter ought to be settled one way or another as nothing is more annoying than a lack of certainty or estab-

lished rule in such matters and the profession would be glad to have the question set at rest.

MR. EDWARD BLAKE, Q.C.

The announcement that the distinguished counsel, Mr. Edward Blake, Q.C., has accepted the offer of a seat in the Imperial House is both a matter of pleasure and regret with us: regret, in that Canada can ill afford to lose a man of such very exceptional ability: pleasure, in that we are proud to see that those great abilities are recognized by our fellow countrymen in the old land. It is not likely that Mr. Blake will return to Canada for some years, for, as an Irishman and a descendant of the old Galway family of Blake of Castlegrove, we do not believe he will readily leave the land of his ancestors, or at least the neighbouring isle, once he returns to it, no matter how much he loves Canada, and therefore he will doubtless practice his profession in his new home.

We do not hesitate to predict that both the English and Irish Bars will give him, as a fellow subject, even a heartier welcome than they did Mr. Benjamin, an alien; and as a statesman and a counsel we shall be more than surprised if his great attainments are not at once recognized and appreciated as they deserve in the House and at the Bar.

NEW BOOKS AT THE LIBRARY.

The following works have been added to the Law Society's Library:

Bourinot's Canadian Parliamentary Procedure, 2nd ed., 1892.

Daniel on Negotiable Instruments, 4th ed., 1891.

Ewell's Leading Cases on Domestic Relations, 1891.

Fisher & Strahan on the Law of the Press, 1891.

Foote on Private International Jurisprudence, 2nd ed., 1890.

Fry on Specific Performance, 3rd ed., 1892.

Herbert on Prescription, 1891.

Heywood's County Court Annual Practice, 1892.

Holland's Jurisprudence, 5th ed., 1890.

Hudson on Building Contracts, 1891.

Indermaur's Principles of the Common Law, 6th ed., 1891.

Laurance on Deeds of Arrangement, 4th ed., 1892.

Lewin on Trusts, 9th ed., 1891.

Ontario Digest, 1880 to 1890.

Patterson on Railway Accident Law, 1886.

Porter on Bills of Lading, 1891.

Ray on Negligence of Imposed Duties, 1891.

Rice on Evidence, 1892.

Serrell on Equitable Doctrine of Election, 1891.

Taylor's Manual of Medical Jurisprudence, 12th ed., 1891.

Thompson on Electricity, 1891.

Travis on Sales, 1892.

Wheeler on Carriers, 1890.

Wood on Mandamus, Prohibition, Certiorari, Habeas Corpus, Quo Warranto, 2nd ed., 1891.

FLOTSAM AND JETSAM.

DINING THE JURY.

Mr. Roger Foster of New York writes thus to the *Albany Law Journal* for the 18th inst.

The wholesome remarks by Judge Woolson on the impropriety of the dinner given to the jury in the United States court for Iowa, quoted in the ALBANY LAW JOURNAL for June 11, illustrate the difference between the manners and morals of this and former centuries. I take exception however to your statement that "the whole affair is eminently American." Mr. Newton followed a precedent long since, happily, obsolete, which once had the highest ecclesiastical as well as judicial approval. It was long the custom in England for the party to whom the verdict was given, to give the jury a dinner. The practice is described in Sir Thomas Smith's Commonwealths, page 74. One of the most notable occasions where the custom was recognized was the trial of the Seven Bishops for libel in 1688. A curious letter from the defendant's solicitor to the Archbishop of Canterbury is still preserved:

"May it please your Grace: We have watched the jury all night carefully, attending without the door on the stairhead. They have by order been kept all night without fire or candle, bread, drink, tobacco, or any other refreshment whatever, save only some basins of water and towels this morning about four. The officers, and our own servants, and others hired by us to watch the officers, have and shall constantly attend, but must be supplied with fresh men to relieve our guards, if need be. I am informed by my servant and Mr. Grange's that about midnight they were very loud one among another; and the like happened about three this morning; which makes me collect they are not yet agreed; they beg for a candle to light their pipes, but are denied. In case a verdict pass for us (which God grant in his own best time) the present consideration will be how the jury shall be treated. The course is usually each man so many guineas, and a common dinner for them all. The *quantum* is at your grace's and my lord's direction. But it seems to my poor understanding, that the dinner might be spared, least our watchful enemies interpret our entertainment of the jury for a public exultation and a seditious meeting and so it may be ordered thus: Each man ——— guineas for his trouble. And each man a guinea over for his own desire; with my lords order, that I or some other entreat them in your names, not to dine together, for the reasons aforesaid. I conceive my lords the bishops will resolve how to direct me in this point, before they come

into court. There were 22 of the jury appeared, and no more. And they that did not serve will expect a reward as well as those who did. I beg your grace's pardon for this trouble; 'tis only to enable my lords to consult what is fit to do decently on our part, and all is entirely submitted to your grace's and my lord's judgment by, my lord,

Your grace's most humble servant,

Jo. Ince.

"Six o'clock in the morning June 30, 1688, at the Bell Tavern, King street.

"Just now the officer brings me word they are all agreed and are sending to my lord chief justice to know, where he pleases to take their verdict.

"There must be 150 or 200 guineas provided."

The bill of legal expenses shows a charge:

"July 2. To the Mr. of the Bell Tavern, where the jury were kept..... £5 2 6"

So it seem as if the Bishop's jury had their dinner after all.

A RED RIVER LOTHARIO.

A will of an old Red River settler brought under our notice lately is candid, if nothing else. The testator confesses to nine children at least, and then adds "if A . . . and B . . . have, in the course of this last winter given birth to children whom they state to be mine, I accept them as such, and want them to be treated as my other children named above."

BRIEFS.

WE REGRET that the editors of the *American Law Review* should think, as they appear to do, judging by an article in their last issue, that the bar dinner committee "again persisted in not inviting" them to their annual event. As a matter of fact no one was asked who was not a member of the Manitoba bar, which reason we hope will be satisfactory. At the same time we are not a little surprised to gather from a certain deprecatory reference to quotations from Rabelais indulged in by our contemporaries that they must be classed with those unfortunates who fail to appreciate the wit of that renowned author, and can only grub for the dirt that but too often mars him.

THE action of Sir Oliver Mowat, Attorney-General of Ontario, in dismissing Mr. Elgin Myers, Q. C., crown attorney for the county of Dufferin in that Province, because he publicly advocated political union with the United States, we heartily commend. Such a stand taken by an official in that position is most improper, not to speak of its being directly opposed to his oath of allegiance. With his private opinions we have nothing to do.

WE WISH to express our thanks to Mr. S. H. Lofthouse, Hon.-Sec. of the English Bar Committee, for a copy of the regulations of that body, and also to Mr. Williamson, the Secretary of the Incorporated Law Society, for the Supplement to the Calendar and Law Directory of the Society.

THE speeches of Mr. Mills, M. P. for Bothwell, are always read with interest, but we would like to know his

grounds for the assertion (Hansard, 2816) that "The English Government in the time of Charles II gave a charter *conveying the fee of Hudson's Bay to the French* (!), but we have always claimed Hudson's Bay to be within our jurisdiction."

THE considerate action of the Queen's Printer in furnishing the profession with advance copies of the new Revised Statutes at a remarkably cheap price, $4.00 for two bulky volumes, has been much and deservedly appreciated.

WE SEE that our remarks on the prohibition plebiscite, —April issue, page 35—are in great measure supported by the expressions of Sir John Thompson, Attorney-General, in the House on May 16th last.

F. G. WALKER, barrister and attorney of British Columbia, has, according to the daily press, been disbarred and disqualified by the benchers of the Law Society of that Province.

REVIEWS.

BILLS, NOTES AND CHEQUES. The Bills of Exchange Act, 1890, Canada, and the amending Act of 1891, with notes and illustrations from Canadian, English and American decisions, and references to ancient and modern French Law. By J. J. Maclaren, Q. C., D. C. L., LL. D., Toronto: The Carswell Co., (Ltd.) 1892.

The author in his volume of lx and 568 pages, appears to pretty thoroughly exhaust the matters of which he treats, and he starts off well by giving a table of cases over-ruled, questioned or distinguished.

The work is, of course, as its title would imply, an annotation of the statutes above mentioned, together with a set of "Illustrations" to each clause of sufficient importance to warrant it, much in the style adopted in Stephen's Digest of Evidence. It has the great advantage of being the latest work on the subject, and will necessarily be of much assistance to the legal professsion in affording a ready reference to the statute, as it now exists, and the cases bearing on the particular point under consideration In our opinion it is a mistake not to have the names of cases cited put in italics, and had there been more of a contrast between the type used in the sections of the act and that in the notes and "illustrations," it would have been advantageous. Saving the lettering, the binding is good, but the paper is indifferent. The index is copious and apparently carefully compiled.

THE LAW SOCIETY OF MANITOBA.

Convocation.

WINNIPEG, MONDAY, MAY 23, 1892.

Present: Mr. Isaac Campbell, Q. C., President; Mr. J. D. Cameron, Secretary; Messrs. Aikins, Q. C., Ewart, Q. C., Archibald, Haggart and Richards.

The president took the chair.

The minutes of last meeting were read and confirmed.

Letter from Mr. Allan Macdonald dated the 7th May, 1892, read and ordered to stand over for consideration.

Letter from Messrs. Nesbitt, Bicknell & Gould, dated 17th May, 1892, with regard to the purchase of the library of the late Judge Sinclair, read and ordered to be filed.

Letter read from John A. Sheppard, dated 21st May, 1892, asking for leave to take his primary examination in July next, notwithstanding that he was not 16 years of age.

Ordered that his request be granted.

Ordered that notice be given to Mr. Ghent Davis that, as the Society intends to consider a re-arrangement of the reporting, his term as reporter will terminate on 31st August, 1892.

Ordered that the monthly subsidy of $40. to the WESTERN LAW TIMES be continued until Trinity term.

Mr. Ewart, Q. C., gave notice of motion of a re-arrangement of the Law Society.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. JULY, 1892. No. 7.

DE PRÆSENTI.

THE COURT HOUSE ADDITION.

As the profession naturally takes considerable interest in the new building about to be erected to facilitate the administration of justice, we are enabled, through the kindness of the architect, Mr. George Browne, who showed us the plans, to give a general description of it.

While it is in one sense an addition to the present court house, yet it is planned so as to eventually become the main and central building of a series of three, and is consequently considerably larger than the old one, from which it will be built at a distance of 22 feet south and connected thereto by an ample corridor of two stories, in which will be the judge's entrance and private stairway, also vault room for the master's office, and judges' and barristers' lavatories.

It will face the east and project nine feet from the present building, and will have a frontage of 100 feet, a depth of 82, and a height to top of dome roof of 73 feet. So far as possible it will harmonize with the old building, but will be bolder in design, and more in keeping with the

purpose for which it is constructed. The basement and first story, to the floor of the second, will be of stone, and the upper portion white brick with stone facings. The central portion, in which is the main entrance, projects six feet from the rest of the building, and is surmounted with columns, balcony, cornice, and curved pediment, and terminates in a dome roof; extending on each side of it are square bays crowned with cornice and pediment. There is also a third entrance on the south side. In the basement will be the furnace room, lunch room, store rooms, and two large lavatories, one for the profession and the other for the public, which are reached by separate staircases. To the right of the main entrance on the ground floor is a cloak room, and adjoining it the barristers' room, 28 x 25 feet; to the left is convocation hall, 25 x 41 feet; facing the entrance and in the centre of the building is the main staircase, lighted from the roof. West of convocation hall and separated from it by the side entrance hall is judges' chambers, connecting by a private stair with the second floor; beyond this again at the south-west corner is the stenographer's room; and back of the main stair on west side, and separated from the barristers' room by the corridor, are the prothonotary's offices, public and private, with a fine vault of two stories running up from basement with private staircase to lower portion.

The front of the second story is occupied by six rooms, four of which are intended for private rooms for the judges, one on the north-east for the benchers, and a sixth room. larger, on the south-east corner for a judicial conference room. These rooms are divided from the other and back portion of this floor by a corridor five feet wide, and parallel for a portion of its extent to the corridor connecting the old building, and so planned as to give the judges private access to their rooms and to the court rooms.

The Term Court room occupies the south-west portion of this story, and is immediately above judges' chambers. It is 42 feet long, 24 wide and 22 high, and opens into the conference room at the east end and into the library along the north wall. The library is a fine room of 61 feet in length, 24 in width and 22 in height, and occupies the north-west corner of this story. It has 8 windows on the west side and 3 on the north side. Those on the west begin 10 feet from the floor, and it is proposed that those on the north side should be cut down to within the ordinary distance from the floor. We sincerely trust that the Government will even go to the length of stretching a point, if necessary, in order to provide stained glass for these windows. The effect would be fine, and as the north windows look out on the back and side of the old building, it really should be done. We should then have a room that the citizens generally would be proud of. Opening off the library and next the main corridor and connecting with it is another barristers' room, which will probably be used for consultations. The top floor will be used for caretaker's rooms and similar purposes.

In the old building the present master's private office and clerk's office will be thrown into one, and the present prothonotary's private room will be utilized as a part of the corridor, while the protonotary's public office and part of the hall and stairway will be changed to the master's room and made to connect with the referee's chambers. Next the corridor is the stamp office.

Up-stairs, the present judges' room will be the barristers' robing room, with lavatory attached, and the space at the south-west corner, now partly occupied by the old jury room, is divided into two jury rooms.

Judging from the above it would seem that the architect has very well expended the appropriation, $50,000, but now that the erection of the building has been decided

upon, it would be a great mistake in policy for the Government to refuse a few additional thousand dollars should it appear, during construction, that it was necessary to expend them in order to procure a building in every way suited for the demands which will be made upon it.

While we are on the subject, we think it our duty to call the attention of the Minister of Public Works to the scandalous state of the court house grounds, which, in defiance of the statute in that behalf, are rankly overgrown with noxious weeds and a disgrace generally to the Department and the Province.

THE BAR AND THE ELECTIONS.

Polling day of the Provincial elections, the 23rd instant, was rather a lucky one for members of the bar who aspired for legislative honors.

In Brandon, Mr. W. A. Macdonald of that city, Opposition, defeated Hon. Mr. Smart by 12 votes; while in Portage la Prairie the Hon. Robert Watson defeated Mr. W. J. Cooper by 103; Mr. J. E. P. Prendergast, Opposition, was returned for St. Boniface by the close majority of 7. In Minnedosa, Mr. R. H. Myers, Government, defeated his opponent, Dr. Roche, by 63; Mr. N. F. Hagel, Q.C., Opposition, was defeated in Kildonan by 11 votes; Mr. C. J. Mickle, Government, obtained a majority of 279 over Mr. Powers; the Attorney-General was returned in North Brandon by a majority of 67; Mr. J. D. Cameron, Government, held his seat by a much increased majority (148) for South Winnipeg; Mr. Carss, Opposition, was 84 votes behind in Saskatchewan, and Mr. James Fisher, Independent, escaped a contest and was returned for his old constituency, Russell, by acclamation.

This means, subject to re-counts, that the profession holds eight of the forty seats in the legislature. We understand that in the Imperial House the profession is

represented by 165 members, one-fourth of its total strength.

REVISING BARRISTERS.

Before the holding of the Courts of Revision of the lists of electors for the late elections, the above unfortunates, or certain of them, came in for the customary slating, which it appears both parties consider the proper thing to mete out to them at that time. After the courts had been held we were unable to hear of any case where the presiding revising barrister did not do his duty, or reasonably failed to satisfy the opposing factions. We do not consider this a matter on which these gentlemen should be congratulated, for we believe that, no matter what his politics are, as soon as you appeal to a lawyer as a lawyer his legal instincts are so strong that he may be relied on to act in a legal manner, that is, fairly and impartially to the best of his ability.

As the result of our observation in attending many courts of revision we are of the opinion that it would be a good thing if the revising barristers were to wear their gowns; the addition of a certain amount of ceremonial would be advantageous in a great many instances and the reverse in none, and every court, no matter how restricted in jurisdiction, should preserve a certain amount of dignity in the eyes of the people. Would some of our English exchanges tell us what the practice is in England in Revising Barrister's Courts in this respect?

NEW RULES OF COURT.

The following rules, lately promulgated, should be borne in mind by the profession.

113. Orders 317 and 411 of the orders in equity are hereby repealed.

114. No petition for re-hearing is to be presented, but a party desiring to re-hear a cause is to set the cause down with the prothonotary for re-hearing and serve notice thereof.

115. No cause set down for argument of a demurrer, or by way of motion for decree, or on bill and answer, or on further directions, or on appeal from the master's report, or on any petition mentioned in order 409, adjourned over from the day from which such cause was originally set down, is to be brought on for argument from the 15th to the 31st days of the month of July, both days inclusive.

T. W. TAYLOR, C. J.,
J. DUBUC, J.,
A. C. KILLAM, J.,
J. F. BAIN, J.

Dated the 15th day of July, 1892.

CHAMBERS IN VACATION.

Judges' chambers will be held in vacation on Monday and Thursday at 10.30 a.m.

Referee's chambers, when held, will be held on the same day and hour as judges' chambers, but there is no certainty that they will be held in any particular week.

BRIEFS.

THE following gentlemen have been admitted as attorneys:

Robert Griffin Macdonald, of Brandon, on July 5, instant.

William Frederick Hill, of Winnipeg, on July 13, instant.

> LEGAL—A YOUNG ONTARIO BARrister wants to secure a position, either on salary or as partner, in an office in Manitoba or Territories. Address "Legal," Tribune office.

THE above advertisement has appeared lately in the local press. Had our "young Ontario barrister" taken the trouble to read up the Manitoba Act relating to the profession he would have found out, what he ought to have known, that as an Ontario barrister he has no status here, and his proposition to enter into partnership before he is called is quite illegal.

THE assizes for the Eastern district will be held in Winnipeg on Tuesday, October 25, next, by Hon. Mr. Justice Dubuc; for the Central in Portage la Prairie on Tuesday, November 1, next, by Hon. Mr. Justice Killam; and for the Western in Brandon on Tuesday, November 8 next by the Hon. Chief Justice. The Equity sittings will be held in October, but the date has not yet been fixed.

IN THE report of the proceedings of the Law Society in our last number we regret to say that, by an error in proof reading, the words "re-arrangement of the reporting of the Law Society" were made to read "re-arrangement of the Law Society."

OBITUARY.

The sudden but not quite unexpected demise, on the 19th instant, of Mr. John William Henry Wilson, of Portage la Prairie, barrister-at-law and District Registrar for the Land Titles District of Portage la Prairie, was a great shock to the legal profession of this Province, to almost every member of which he had been personally known and respected for many years.

He was born in Waterford, Ireland, on the 21st day of February, 1833, where his father, Captain John Wilson of the 70th Regiment, was then stationed. When he was two years old his widowed mother came to Canada and settled at Toronto. He was called to the Ontario bar in 1854 and for many years practised his profession at Bradford in that Province. The same year that he was called he was married to Emelia Mary, daughter of Mr. Robert McIntosh, of Toronto, Ontario, by whom he had five sons and eight daughters, nine surviving him. He came to this Province in 1882 and was called to the bar here in Easter Term of that year, and practised in Winnipeg till 1889, when the Land Titles Office at Portage la Prairie was established and he was then appointed to the responsible post which he held till his death. For many years he was a Bencher of the Law Society and one of the most active members of that body. He was also a Mason and at the time of his death was Grand Master of the Grand Lodge of Manitoba of that fraternity. Of his sons two, Charles Patrick and Robert John, have been called to the bar of this Province, and a third, Herbert George, is a student-at-law.

At a special meeting the Benchers passed a resolution expressing the deep regret of the profession at the death of

their esteemed fellow and extending their sympathy to the bereaved family.

THE LAW SOCIETY OF MANITOBA.

Convocation of the Benchers.

WINNIPEG, TUESDAY, JULY 12TH, 1892.

Present: Mr. W. E. Perdue, treasurer; Mr. J. D. Cameron, secretary; Messrs. Aikins, Q.C., Macdonald, Q.C., Richards and Haggart.

In the absence of the president the treasurer took the chair.

The minutes of the last meeting were read and confirmed.

Letter read from the Attorney-General, dated 5th July, 1892, stating that the plans of the addition to the Court House had been prepared and were open to inspection by the benchers.

Ordered that the Secretary acknowledge the receipt of the letter and arrange an appointment with Mr. Browne (the architect) for the benchers to see the plans.

Letter read from J. B. Cain, dated July 12th, stating he had arrived in town too late for the primary examination and asking for a special examination.

Ordered that his request be granted on payment of $10 to the examiners if they are agreeable thereto.

Letter from Mr. Davis, dated 12th July 1892, with regard to the reporting, read and ordered to stand.

Petition presented from E. W. Pearson that he may be allowed to present himself for the attorney examination in Michaelmas Term next.

Ordered that the prayer of same be granted.

Petition presented from C. H. Royal for leave to take his final examinations for call and attorney next Michaelmas Term.

Ordered that the prayer of same be granted.

Report presented from the examining committee, dated 30th June, 1892.

Ordered that same be received and adopted, and that S. E. Clement, R. A. Clement, A. J. H. Dubuc, and J. F. Fisher, graduates, be admitted as students at law and articled clerks.

Report presented from the examiners, dated 11th July, 1892.

Ordered that same be received and adopted.

That J. A. Sheppard be allowed his primary examination.

That C. E. Bastin be allowed his first intermediate examination.

That E. W. Pearson, J. H. Hunt, and C. H. Royal be allowed the second intermediate examination.

That J. H. Leech be allowed the attorney examination, and

That W. F. Hull be admitted as an attorney.

Ordered that all policies of insurance, as they become due, be renewed for three years.

Ordered that the reporting committee be requested to take charge of the reports after the 31st August next, until the question of reporting has been settled.

Ordered that the monthly subsidy of $40 to the WESTERN LAW TIMES be continued until the end of October next.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. AUGUST, 1892. No. 8.

The Privy Council and the School Case.

When Mr. Justice Killam delivered his judgment on November 24, 1890, in the now celebrated case of *Barrett* v. *The City of Winnipeg*, holding that the Roman Catholics of Manitoba were not entitled to state aided separate schools, he was doubtless impressed with the fact that he was giving the first in a long series of judgments which would reach up from the Bench of our young province to the foot of the Throne. Further, the learned judge must have realized the fact that he was rendering a decision that would be exposed to the most searching criticism and analysis, because it would decide a point in favour of one of the contestants in a legal battle the consequences of which would be of the gravest to the people of Manitoba, and the cause itself the most important that the provincial courts had been called upon to decide, if not one of the greatest moment that had come before the judges of Canada.

As we know he found against the construction that the Roman Catholics placed upon the Public Schools Act of 1890, and his decision was upheld by the Full Court of Queen's Bench of this Province, one judge dissent-

ing, a Roman Catholic. The Supreme Court of Canada, composed of six judges, three of whom were Roman Catholics, unanimously reversed the decision of the Manitoba courts, and the defendants appealed to the Privy Council, with the result that the finding of the Supreme Court has been reversed and those of the Full Court of Manitoba and Mr. Justice Killam restored.* Such a conclusion of this great case cannot fail to be gratifying to the last named judge, and to the rest of the judges of the province who shared his views, and also to Mr. Joseph Martin, the author of the act, and not the less so because of the fact that the Supreme Court has sometimes evinced an inclination to over-rule the courts of this province—in fact we are informed to the extent of ninety per cent. of the cases so coming before it.

As will be evidenced by a reference to our previous remarks on this subject, we were not at all surprised to find the Supreme Court itself over-ruled, and in truth such an event is nothing new to that body, the confidence of the public in which as an exponent of constitutional questions has long been on the wane, and it is difficult after this last reversal to say what weight that Court will in future carry in such questions, if any; but of this more in another article.

Another feature which has greatly pleased the people of Manitoba is the celerity with which the Judicial Committee announced their finding, and that in a judgment which is a perfect model of succinctness and perspicuity and a positive delight to read after the weary meanderings of some of the judgments given below. Though the argument lasted from July 12 to 15, yet the result of their Lordships' deliberations was announced on the 30th and telegraphed that same morning to this city.

The question is now under discussion in the lay press

* A full report of the judgment will be found elsewhere in this issue.

as to what is the effect of subsections 2 and 3 of section xxii of the Manitoba Act:

XXII. In and for the said province, the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:

(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons have by law or practice in the province at the Union.

(2.) An appeal shall lie to the Governor-General-in-Council from any Act or decision of the Legislature of the Province, or of any Provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

(3.) In case any such Provincial law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General in Council on any appeal under the section is not duly executed by the proper Provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

It is open, then, for the Roman Catholic minority to appeal to the Governor-General in Council under the 2nd section for relief, and if the Governor-General in Council grant relief, and the province refuse to carry it into effect, then, *and not till then*, the "Parliament of Canada may make remedial laws for the due execution of the provisions of this section;"

But the express condition is that no "appeal shall lie to the Governor-General in Council" unless the appellants can show that they have been prejudicially "affected" in a "right or privilege" which they have "by law or practice;"

Now the most august tribunal of the age has decided that no "right or privilege" which the Roman Catholic minority has "by law or practice," has been "prejudicially affected" by the Public Schools Act of 1890, which is the "act or decision of the Legislature" complained of;

Therefore, neither the Governor-General in Council nor, consequently, Parliament has any jurisdiction in the matter and there are no grounds upon which an appeal can lie against that act, and no constitutional cause for any interference with its operation.

DE PRÆSENTI.

THE LONG VACATION.

From the beginning of the present to the end of the following month, many familiar faces have been and will be missed from town, the owners of which are or will be for the most part disporting themselves in rural retreats during the very hot weather we have had and may expect to have for some little while yet. We do not remember a hotter summer for the last ten years, but all the inconveniences of the heat are forgotten when we think of the bountiful harvest that is ready for the reaper and which will be of such incalculable advantage to the prosperity of this country, especially as the greatest inducement to hold out to the emigrating surplus population of Europe and demonstrate to it the pecuniary advantages of agricultural life in North-Western Canada. Though the volume of legal business has not been small, relatively, during the past year, yet the profession generally has experienced as much as any class the difficulty of obtaining ready money. Everyone nevertheless feels that prospects are good and trusts to a big crop and high prices to put ample money in circulation. We can say with great fervour that no one wishes for such a state of affairs more than we do, and we hope that some of our subscribers who are in default will

soften their hearts and send in their back subscriptions and help us to enjoy our holiday with the rest of that distinguished body, the Manitoba bar. We could write indefinitely on this fascinating subject, but this being a vacation issue, is necessarily brief, and we refrain.

QUEBEC COUNSEL IN ONTARIO.

The last issue of the *Canada Law Journal*, July 16th, contains the report of the half-yearly meeting of Convocation of the Law Society of Upper Canada which took place as long ago as December 29 last. While it is difficult to understand the reason of supplying such "ancient history" to the public, yet some of the proceedings are interesting notwithstanding the fact that we are not enlightened as to what eventually became of them. The following motion of Mr. Æmilius Irving, Q.C., which stood till "the first day of next Term" is a case in point.

It appearing that in the matter of *The Queen and Connolly*, before the Common Pleas Division of the High Court of Justice, on motion made before the Divisional Court on 5th December instant, the court was pleased to hear as counsel on behalf of the defendants Connolly and others Mr. Fitzpatrick, one of Her Majesty's counsel for the province of Quebec, duly authorized to practise as a barrister in the courts of justice of Quebec, but not having been called or admitted to the practice of the law as a barrister by the Law Society of Upper Canada, according to the statute in that behalf;

Resolved, that the members of Convocation present respectfully protest against the courts of this province hearing counsel at the Bar, or within the Bar, who have not been admitted to practice at the Bar in Her Majesty's courts in Ontario according to the provisions of the law and the Rules of this Society (*Re De Souza*, 11 Ont. 43), and ordered that the Secretary forward a copy of this resolution to each of the judges of the Supreme Court of Judicature.

EARLY CLOSING FOR SOLICITORS.

Why do not some enterprising articled clerks go around with a petition to the different solicitors' asking them to close their offices at five o'clock during vacation every day and one o'clock on Saturday all the year around?

We believe all the firms would readily agree to such an arrangement. It is a practice that has been adopted in the large Eastern cities and why should it not be put in force here where there is no comparison in the volume of business transacted?

ARTICLED CLERKS IN THE ATTORNEY-GENERAL'S DEPARTMENT.

The Law Society has hitherto admitted those persons to practice who were clerks in this department and at the same time articled to either the Attorney-General or his deputy. Now such clerks are paid officials of the Government, drawing living and liberal salaries, and yet in defiance of the fundamental and wise rule of the Society that articled clerks shall carry on no business or employment, certain persons have been admitted as above stated. It is manifest that this practice works a grave injustice on other articled clerks and students, against whom the rule is rigidly enforced with excellent results. The present is the best time possible to put a stop to this harmful practice (which is objectionable not only to the students but to the profession) because there are now no clerks in the department under articles. We feel sure the benchers will be only too glad to take this matter under their best consideration now that it has been publicly brought to their notice as it is one which directly affects the *personnel* of the profession.

THE COURT HOUSE GROUNDS.

A much needed and substantial sidewalk has been put down between the Court House and the Land Titles Office. Some feeble efforts have also been made to attack the rank and luxuriant weeds referred to in our last issue, which increase and multiply on those unsightly premises in direct contravention of the statutes passed in the legislative

building which overlooks them. The department of Public Works should organize a bush-choppers gang and engage some explorer of well advertised courage to lead it against and through this howling jungle now doing duty for turf, for the mind of the average day-labourer would quail before such an obstacle. Mr. H. M. Stanley appears to be out of a job just now and his eminent services might be advantageously retained. We will see that he is well advertized and he will be permitted to carry the Yankee flag at the head of the gang as he did in "Darkest Africa," and run for a constituency for the local house after he has completed his arduous labours, with better results, we trust, to himself than he has lately experienced in the English elections.

A CORRECTION.

We regret to say that we were in error in announcing that judges' chambers would be held on Monday and Thursday during vacation, for we learned just too late to make the correction that they would be held on the latter day only. The mistake arose through some misunderstanding with the clerk in chambers.

FLOTSAM AND JETSAM.

CURIOUS LAWS OF OLD CORPORATIONS.

One of our contemporaries lately had an interesting article on the Blue Laws of New England, giving some quaint examples of those arbitrary and almost "ferocious" enactments. Reading the other day a copy of the Corporation Book of the ancient town of Galway,* we extracted therefrom, *verbatim*, a few examples of the quaint "lawes" of the Mayor and Council of that Anglo-Norman community, isolated as it then was in the wilds of Connaught.

A.D. 1485. Item: It ys enacted and agreid that no manner [of] dweller of whatsoever degre he or they be of, shall not sell nor set no lande or tenement within the same Town of Galwey to no Irish man without lycense of the counsayll and officers for the tyme being, on payn of forfayting the said landes or tenement with an hundred shillings. . .

This "item" shows the great and exclusive power of the Mayor and Council, who could not only prohibit sales of land but exercise their authority to the extent of forfeiture in case of disobedience; and the very existence of such power shows how completely the people of the town were beyond the control of the general law of the kingdom, if any there were at that date. This is a point for Mr. Dillon to notice in his excellent work on Corporations.

A.D. 1505. Item: That every man that answereth not the crye or skirmishe at every of the gates, at the beginning, with his feansabull weapon, to paie and forfayte xii. *d.*

Evidently the stout burghers of the "Citie of the Tribes" (the 14 ancient families controlling or owning the corporation) lived in a state of warfare with, and assaults from the native Irish, and the "crye or skirmishe" at the gates of the town was a frequent occurence.

* Historical Manuscripts Commision, 1885, report 10, appendix S.

The most celebrated of these gates, the west one, had this significant and pious inscription over it:

"From the ferocious O'ffaherties, Good Lord deliver us!"

Possibly this "item" may be the origin of the frivolous *fin de siècle* expression of "Johnny get your gun." Professor Skeat may throw some light on this speculation.

A.D. 1511. Item: That no butter be sold above a penny a pound . . . and his body to be put in prison that doth the contrary.

Item: Whatsoever man of the town is called or warned to queste or sisse and aunswereth not to the same, to forfate xii. *d.*

Item: That no alliaunt nor strangers shal be loghers ne in town nor land.

It appears from the first of these that butter-selling must have been a rather precarious business, and from the second that it was just as hard to dodge a sheriff's summons to serve on a jury nearly 300 years ago as it is to-day; and from the third that the genus "tramp" was regarded with a degree of suspicion which ten generations of loafing have not served to lessen.

1512. Item: That all ydell men and women, whether they be householders or not, that is not able to paie wa(t)ch tax, ne tallage, to be expulshied oute of the town by the officers, on payn to lesse vi. *s.* viii. *d.*

Poverty, plainly, was as great a crime then as now.

1514. Item: It is ordered that the Maior, Wardain and Bailiefes for the tyme being shal be furst servid of fish and fleshe, both in market and shambles; and after every man to be served, accordinge as they come to b(u)y ther meate.

In order to be complete this item should have further provided that the "Maior, Wardain and Bailiefes," while being served first, should have the privilege of paying last.

1516. Item: That every of the statte of this town, when they are warnid to come to the courte house, shall sit every man according to his degree and callinge, and also shall were and use their gouins every principal courte days in the same courte-house, on payn to lesse for ever of both faultes iiii. *d.*

This corporation evidently was aware of its unique authority and dignity and determined to live up to them.

1518. Item: It is statutid, that whatsoever man or woman of this town saye that he will have the town pledge to be made by anny Irish

man, for every tyme so sainge to forfait xii. *d. and if anny man shuld bringe anny Irish man to brage or boste uppon the town to forfait* xii. *d.*

Item: That no man of this town shall (h)oste or receve into ther housis at Christemas, Easter, nor no feste elles, enny of the Burkes, Mac-Williams, the Kellies, nor no cepte elles, withoute license of the Mayor and Counsaill for the tyme beinge, on payne to pay for every tyme makinge defaulte xx. *s.*, **that neither "O'" ne "Mac" shall strutte ne swaggere thro' the streets of Gallway.*

From the first "item" we gather that there must have been some pretty mean citizens even at that early age, and certainly any burgher who would import a thumping gallow-glass from, say, Connemara to "brage or boste upon" his native town richly deserved to forfait xii. *d.* The second item we regard as a direct violation of the laws of hospitality, for we do not see why the inhabitants should not at such festive seasons call in their whilom enemies to "raise Cain," drink "faith cure" and philander generally. Perhaps, however, the reason for the enactment may be found in the last few words, because the sight of the "O's" and "Macs" strutting and swaggering through the town, inviting their hosts to "come on," after putting all the drinkables where they would do most good, was too much for the Anglo-Norman pride.

1519. Item: That no Irish judge nor lawior shall plede in no man's causse or matter within this our court, for it agreith not with the King's lawes, ne yet the Emprors in many placis.

This was a most unfair attempt to boycott the ancient Brehon Law, and it also shows that ancient judicial findings resemble modern ones in that they clash "in many placis."

(*To be continued.*)

A CANDID JUDGE.

The Chicago *Legal Adviser* is responsible for the following:

A clergyman engaged in preaching rose to a fervid pitch of eloquence and in the midst of it exclaimed:

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*The words from here on are given by Hardiman in his *History of Galway*, 1820.

"Show me the drunkard! show me the drunkard!—of all the men on the earth, the most unfortunate. Show him to me!"

To the consternation of all present, an old judge arose, and, unsteadily maintaining himself, exclaimed, "Well, sir, here I am!" The clergyman having realized upon his investment much sooner than he anticipated, didn't know what to do with it. They finally pulled the old judge down, and the incident had passed when the clergyman again struck an impassioned attitude, and exclaimed in the honesty and fervour of his heart:

"Show me the hypocrite! Of all men on God's green earth, the most despicable. Show me the hypocrite!"

The judge arose the second time, and reaching his cane over to a certain shaky old deacon, exclaimed, "Deacon, why the devil don't you get up when you are called on?"

CRUELTY TO ANIMALS.

We find the Chicago *Legal News* guilty of this gem:

"Once," says an old Californian, "when Niles Searles was district judge up in Nevada and Sierra counties, the late Judge Belden and I were on opposite sides of a case which was to be argued before him. When we reached Nevada City we found the judge about to depart for Downeville on mule-back to hold court there. He made the novel proposition that we should ride over the mountains with him and argue our case on the way. We accepted the suggestion, secured horses and started off on either side of the judge's mule. I opened the case and concluded my argument as we reached North San Juan. Then Belden replied. He was very much in earnest and grew quite warm over the case, and didn't conclude until we had passed Nigger Tent. Then Judge Searls ruminated a short time and delivered his decision flat against Belden. Belden was so much worked up about the case that the decision made all three of us a little uncomfortable for a time, and not a word was spoken as we jogged along. Then, just as we road down to Goodyear's bar, the judge broke the strained silence with the remark: 'My mule seems very tired.' 'I should think he would,' replied Belden, 'after getting up such a decision as that.'"

BRIEFS.

THE profession would like to know when the Revised Statutes will be completed ?

MR. P. V. GEORGEN, of Portage la Prairie, who was called to the bar of this Province on June 5, 1879, died in this city on the 8th inst.

THE Exchequer Court will sit here on September 13th, at 10 a. m. ; at Regina on 20th of same month ; at Calgary on the 22nd ; at Vancouver on the 27th ; and at Victoria on the 29th.

THE full text of the Imperial Act to provide for the recognition in the United Kingdom of Probates and Letters of Administration granted in British Possessions, assented to on May 20th last, appears in the *Canada Gazette* for the 23rd ultimo.

IN THE same issue appears the text of the extradition treaty between Great Britain and Monaco. Places of refuge for criminals are rapidly becoming fewer.

WILL SOME of our readers inform a correspondent what rule of court or statutory provision requires declarations or pleas to be *filed* in addition to being served ? We are unable to do so, and regard it as an erroneous practice, probably imported from Ontario like the now extinct 10 day writ of that province which so long flourished to the wrongful exclusion of the 8 day one provided by the Common Law Procedure Act.

OUR THANKS are due the Queen's Printer for an excellently printed and neatly bound copy of the Statutes for this year.

THE

WESTERN LAW TIMES.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. SEPTEMBER, 1892. No. 9.

DE PRÆSENTI.

THE LAW REPORTS.

That the Manitoba Law Reports did once exist is indisputably demonstrated by the fact that the profession some days ago received the index to volume 7 which should have been distributed some eight months before.

It is also a fact, however incredible it may seem, that since about the middle of August last year up to date (exclusive of the above index) only two numbers of these reports have been issued, nevertheless the sum of nearly *one thousand three hundred dollars* has been, or will have to be paid the reporter up to the first of this month !

Now if there have been no cases to report since April 9th of this year—the date on which the last issue appeared —then the amount paid the reporter is glaringly excessive. A reference to the columns of this journal will prove that a great number of important cases are in arrear; the only conclusion that we can come to is that the payment to the reporter under such circumstances of such a large sum of the Law Society's funds is an imposition on its members, and that the Benchers consider it such is evidenced by their recent resolution under which the reporting com-

mittee have taken over charge of the reports from the 1st instant pending some radical and imperative changes.

We have hitherto, from motives of delicacy, refrained from noticing this matter, in spite of repeated requests to do so, but in view of existing circumstances our duty is plain.

PARTNERSHIP IN COURT OFFICES.

OFFICE OF
COUNTY COURT OF BEAUTIFUL PLAINS.
R. EDWARDS, Clerk.
T. E. ADAMS, Dept. Clerk.
Real Estate and Loan Agents,
Commissioners in B. R.
Neepawa, - Manitoba.

The above is the heading of the official paper of the clerk of the County Court of Beautiful Plains. That institution is apparently run as a partnership concern, a sort of adjunct to a real estate business and affidavit-swearing-shop, at a cash basis, doubtless. What a charming combination of offices! You can, by the agency of this obliging firm, unload your swamp claim on the Eastern "tenderfoot," mortgage the hereditary homestead to "head-off" the seductive machine agent and beat the country store-keeper, sue the aforesaid tenderfoot for the balance of the purchase money, and, finally, to bolster up your character after these little transactions, make your own affidavit before these guardians of our laws to the effect that you *are* an honest man!

But in all seriousness we refer this matter to the Attorney-General, and particularly to the Judge of this County Court, over the officers of which he has ample jurisdiction. The public looks to him to see that the administration of justice is not debased.

THE NEW LAW OFFICERS.

The *Law Journal* says on this subject :—

The appointments of the new law officers leave nothing to be desired. Sir Charles Russell returns to the office of Attorney-General with the fullest approbation even of his political opponents, while the appointment of Mr. Rigby as Solicitor-General will be exceedingly popular with the Chancery Bar, of which he is so great an ornament. If, as seems not improbable from the utterances of Sir Charles Russell, any restriction is placed upon the right of the laws officers to take private practice, a flood of business will be let loose in both divisions.

The *Irish Law Times* prints a number of extracts from the legal press shewing that there is a divergence of opinion on this question of the private practice of the Law Officers, ranging from the proposal of entirely prohibiting private practice by both officers, to making the office of Solicitor-General a permanent one with a salary and £6,000 a year in fees, and that of the Attorney-General one changing with the Government as at present, but with £7,000 a year, plus fees, and the right to practise before the House of Lords and the Privy Council, with a retiring pension of £4,000.

A WARNING TO STUDENTS.

WANTED — SECOND YEAR LAW Student to take charge of branch office; applicant will please state experience and also amount of salary expected. Write to Box 633, Morden.

We presume the man who lately inserted the above advertisement in the *Free Press* knew what he wanted and what he was doing, especially as we may assume he is a member of the profession. But if he did know what he was doing it was a rather shabby trap to entice some innocent law student into, because the conduct of a branch office by a student is opposed to one of the most stringent rules of the Law Society, as the student will find to his cost when he comes to file his papers at the end of his long years of waiting. An actual and *bona fide* attendance at

barrister's chambers, or solicitor's office, as the case may be, is required, and during that time no other occupation whatever is allowable.

THE LATE LORD CHANCELLOR'S FAREWELL JOB.

The August issue of the London *Law Notes*—a fearless and outspoken journal— contains the following article on the notorious jobbery of a Lord Chancellor who has done all he could in this direction to degrade his lofty office :

We congratulate Mr. Justice Gainsford Bruce on his appointment as a Judge of the High Court. We congratulate Lord Halsbury for his cheek. Not even in the midst of a General Election can his Lordship refrain from a job. Now we do not mean that Mr. Gainsford Bruce is not qualified to be a Judge. We know little or nothing of Mr. Gainsford Bruce's legal abilities—his name has not been very much to the front in legal circles. Lord Halsbury may have made, from a legal point of view, the best possible appointment. But we are most strongly opposed—we raised our voices on this subject long before our old friend "The Law Times" —bitterly opposed—to the baleful influence of politics on the law. A more striking example of this influence has never occurred. Mr. Ritchie lost his seat. Mr. Ritchie must have a safe seat found for him. Holborn is a safe seat. Mr. Gainsford Bruce holds that seat. Happy thought! Make Mr. Gainsford Bruce a Judge. Seat becomes *ipso facto* void. Offer it to Mr. Ritchie. All honour to the Holborn Conservative Association, who decline to have Mr. Ritchie, and prefer to exercise their own choice without dictation from the higher authorities. It is, we admit, quite possible that in appointing Mr. Gainsford Bruce the Lord Chancellor was compelled by Lord Salisbury to do what he otherwise would not have done. But a Lord Chancellor is a high official in the state, and should be able to withstand undue pressure from all quarters—for a Lord Chancellor to yield is cowardly or base, in that it implies a desire to make some return for favours already received. Our readers will please remember that we make no charge against Mr. Justice Gainsford Bruce of incompetency for his office. We are not animated by any political feelings: we should write in the same strain if such an appointment had been made by Lord Chancellor Russell. We have always urged, and shall continue to urge, that the law must be free of politics. The appointment of Judges should have nothing to do with politics: hence it follows that the office of Lord Chancellor should not be a political office, but a purely legal office, to be conferred on the most eminent lawyer of the time, whether for life or for a stated number of years is a matter of detail to be settled in the future.

After reading the above it is pleasant to read what the *Law Times* says of the present Lord Chancellor :

We shall be very glad indeed to see Lord Herschell back on the wool sack. He is a man for whom every lawyer has an unbounded respect and admiration. We venture to prophesy that under the new Chancellor no more will be heard of the recent complaints of jobbery and nepotism.

This is the kind of judge that the bar of Greater Britain delights to honour.

DISHONEST REGISTRARS.

In the *Free Press* of the 31st ult. Mr. John Steven, of Deloraine, points out the shameful state of affairs which exists in the registration district in which he lives. This is the letter:

To the Editor of the Free Press.

SIR,—I trust you will allow me space to call attention to the question of land registration in this district. As most of your readers are doubtless aware the real property act or Torrens system is in force only in some parts of the province, the old act being still in force in this district and also in other parts of the province. According to sec. 23, chap. 6, of the Land Registration Amendment Act, 1583, and amendment thereto:

"No registrar or deputy registrar or clerk in his office shall directly or indirectly act as the agent of any corporation, society, company, person or persons investing money and taking securities in real estate within his county, nor shall such registrar or deputy registrar or clerk in the office advise for fee or reward or otherwise upon titles of lands or practice as a conveyancer within his county, nor shall he carry on or transact within the registry office any other business or occupation whatever under pain of forfeiture of office."

Notwithstanding this clause several of the local land registration offices are held by men do business in land, acting for loan companies, etc., and deeds and mortgages registered in these offices to the amount of many of thousands of dollars are left to the care of registrars who personally, or for companies whom they represent, are largely interested in these deeds or mortgages. Some of these registrars also act as conveyancers in which capacity they transfer and deal with land in their own registration divisions, which is also clearly against the act and against the interest of the people, as by so acting they interfere with those who contribute towards their support as registrars and whose business is being poached upon by the illegal action of these already well paid registrars. Trusting that this will meet the eye of the hon. the attorney-general and the inspector of registry offices, and thanking you in anticipation.

Mr. Steven has made a straightforward and manly charge, and has called upon the Attorney-General to see that the law is enforced. The propriety of this enforcement requires no argument, the abuses complained of are real ones, and they should be immediately put down, or the law is a farce, and those whose duty it is to enforce it are unworthy of office. We repeat the demand for prompt action in the matter.

THE MICHIGAN LAW JOURNAL.

The *Michigan Law Journal* complains not a little of a sentence in the *American Law Review* which perhaps reflects on the present popularity of the Michigan Law School. In the same issue our contemporary, referring to this journal, otherwise complimentarily, says "It reports one or two cases," etc.

At the time it so wrote we had published since the first of the year, in eight monthly issues, no less than 91 cases, being an average of nearly 12 cases per month, and at no time less than five.

Now, while we go in for quality of cases, not quantity, we object to such reckless and careless assertions. We hope our contemporary will take an early opportunity of making the *amende honorable* and trust that it will in future when engaged in the diverting pastime of throwing stones keep an eye on its own plate glass.

LEGAL APPOINTMENTS.

September 3, 1892. To be District Registrar for the Land Titles Office at Portage la Prairie: George W. Beynon, barrister-at-law, of Portage la Prairie.

August 18, 1892. To be Registrar of the Court of Queen's Bench in Equity: Robert J. Wilson, barrister-at-law, of Winnipeg.

To be District Registrar for the Land Titles District of Morden: Alexander McLeod, barrister-at-law, of Winnipeg.

FLOTSAM AND JETSAM.

SWEARING IN QUEEN'S COUNSEL.

According to *Law Notes* the swearing in of newly appointed Queen's Counsel before the Lord Chancellor, is a poor affair. "After the gentlemen so honoured have duly paid the fees for their patents, amounting to over 60*l.*, they receive an intimation that the Lord Chancellor will receive them at Westminister. Arrayed in full-bottomed wigs, knee breeches, and stockings they repair to the House of Lords, and, on arriving there, are presented with a printed copy of the oaths to be taken. On being summoned before the Lord Chancellor, they all stand in a row, seniority of call to the Bar being observed. His Lordship's Secretary then gabbles through the oath, which is repeated by the learned gentlemen. The Lord Chancellor then presents a box containing the patent of appointment to each of the gentlemen, shakes hands with him, and the ceremony is over."

LEGAL MEDITATIONS.

What use to me is "Byles on Bills?"
For "Jarman on the Law of Wills"
I wouldn't give a jackstone.
"Jury and Jury Trials," nor more,
For "Coke or Littleton"—yes, or
For Chitty, Kent or Blackstone.

Will Byles help me to pay the bill
I owe for flowers? Can *her* will
Be changed by reading Jarman?
What use are "Jury Trials" to me?—
Or Kent, or Chitty? Blackstone?—he
Is dryer than theosophy,
Yes, worse than any Brahmin.

And "Kneeland on Attachments," too,
Has nothing in it that will do;
The title is misleading.

And though through dusty books I read,
Alas I n'er can learn to plead
In Cupid's court, so she will heed,
From "Stephen's Rules of Pleading."

"Collyer on Partnership" I've read
(An ancient work) "Contracts to Wed,"
By some one named Fitzsimmon.
Nor does it seem to help me on,
That "Marriage Settlements" I con,
Or Schouler's learned book upon
"The Law of Married Women."

There is no statute I can find
Will make a maiden change her mind;
Nor know I where the place is
To find a law will help me win
A suit like mine—or I'd begin
To search it out. It isn't in
My set of "Leading Cases."

But—"Baylies on Appeals!" Ah, there
Is just the answer to my prayer!
I know not how to do it.
From her decision—by the seal
Of all the courts!—I will appeal;
And that will make the verdict *nil*,
Until I can renew it.—*G. Burnett, in New England Magazine.*

COKE ON BONNETS.

A young lawyer in Boston was asked why in the English Courts a woman must always remove her hat. He could not tell, but an old lawyer to whom the question was referred, recalled the opinion of Sir Edward Coke on the matter. It was a murder trial where the prisoner was a woman and appeared before the court with her head covered. Sir Edward Coke ordered the prisoner to remove her hat and said: "A woman may be covered in church but not when arraigned in a court of justice."

The accused tartly replied: It seems singular that I may wear my hat in the presence of God but not in the presence of man."

"It is not strange at all" replied the judge, "for the reason that man with his weak intellect, cannot discover the secrets which are known to God; and, therefore, in investigating truth where human life is in peril and one is charged with taking the life the court shall have all obstacles removed. The countenance is often the index to the mind,

and accordingly, it is fitting that the hat should be removed and therewith the shadow which it casts upon your face."*

The hat of the prisoner was taken off, but she was allowed for modesty's sake to cover her head with a kerchief.—*Legal Adviser.*

WHO IS HE?

When one talks of hereditaments, misprisions and indentures,
Of chattels, and of mortgages, of choses and debentures,
Of assumpsit, debt, and covenant, of trespass and attainders,
Of attaching and conveyancing, of signing and endorsing,
Of femes, both sole and covert, separating and divorcing,
Of words of twenty letters, which you'd think would break his jaw.
You will then know that the fellow's just begun to study law.—*Life.*

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* This is not the custom now.—[Ed.]

BRIEFS.

EQUITY sittings will be held on the 11th proximo.

THE August issue of *Law Notes* contains the new rules of the Bar Committee relating to retainers.

MR. Samuel Black, Town Solicitor and Town Clerk of Belfast, was recently knighted by the late Lord Lieutenant.

WE are glad to see that the *Albany Law Journal* deals with Miss Gail Hamilton and her ridiculous and bumptious "Open Letter to the Queen" (!), in the *North American Review*, as she and it deserve.

THE *Australian Law Times* publishes very good reports which it curiously styles "Notes of Cases." One of these "notes" lately occupied eight quarto pages; cases occupying several such pages are very common.

IT is rumoured that the Government will print the account of the proceedings before the Privy Council on the School Case, which is in their possession, having been forwarded day by day. Such a course would be a commendable one indeed, and of great public value.

ACCORDING to the *Law Journal* there have been 111 applications in England during the past year to strike solicitors off the rolls. Of these, sixty-five were refused and forty-nine granted. Twenty unqualified persons were convicted of acting as solicitors during the same period.

ON the title page of the Manitoba Reports is, or rather was, the announcement that they are "published by and under the authority of the Law Society of Manitoba."

This is redundancy; if they are published *by* the Law Society it must necessarily be done "under the authority" of that body. But this, in view of the sudden death of the reports, is "ancient history."

OBITUARY.

The Hon. Marc Amable Girard, Senator, died at his home in St. Boniface, on Monday morning, the 12th of September instant. He was born at Varennes, in the Province of Quebec, on April 25, 1822, andwas a son of Amable Girard, yeoman, of that place, where the family homestead had been situated for many generations. He was a notary of the Province of Quebec, having been appointed such in 1844, and was admitted to the bar of this province under the then existing statutes on the 8th day of May, 1871, taking precedence immediately after the late H. J. Clarke, Q.C., and was consequently at the time of his death the Father of the Bar. He came to Manitoba in 1870 with Archbishop Taché and Mr., now Lieut. Gov. Royal, and on the 17th September of that year was sworn of Lieut. Gov. Archibald's council as Provincial Treasurer. He subsequently occupied many important positions in several cabinets of the province, being at various times Premier, Provincial Secretary, Minister of Public Works and President of the Council. He was called to the Senate in 1871 and, in December, 1872, was appointed senior member of the Executive Council of the North-West Territories. In 1878 he married Madame Aurelie Lamothe, widow of Alfred Versailles, Esq., of Montreal, and by her had two children, a son, who died an infant, and a daughter now living.

Though he mainly devoted his attention to politics, being the lay leader of the French Canadians of the North-West, yet he did not entirely neglect his own profession as he was the head of the firm of Girard, Kierzkowski and Beaudry, which practised about 1878 for some little time on Lombard street in this city. It was he who directed the compilation and printing of the Laws of Assiniboia and he interested himself not a little in the establishment and formation of our Law Society.

The province has suffered a great loss in the death of this most estimable man, whose patriarchial mien and amiable and benevolent face were truly the index to his genial mind.

THE

WESTERN LAW TIMES

OF CANADA.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. OCTOBER, 1892. No. 10.

DE PRÆSENTI.

A DELAYED ISSUE.

Owing to the unavoidably prolonged absence of our editor from town, consequent upon an accident, we were unable to go to press as usual, and must in consequence ask our subscribers to pardon a curtailed number.

THE GRAND JURY'S COMPLAINT.

At the late Winnipeg assizes the grand jury handed in the following document to the presiding judge, who thereupon thanked them for the manner in which they had discharged their duties, and relieved them from further attendance:

To His Lordship Judge Dubuc:

We, the Grand Jury of the Eastern Judicial District, beg to report to your Lordship that, as far as we have been able, we have discharged our duties, but as the proper authorities have refused to give transport to convey us to the provincial asylum at Selkirk, although we unanimously preferred a request to be conveyed there, we beg to be discharged. We beg to thank your Lordship for your charge and the explicit directions therein, all of which is respectfully submitted.

John Sutherland, Foreman.

Now, though we recognize the desirability of the grand jury visiting the jail and the court house, yet where should they stop? If they inspect the above places, why not the land titles office at Winnipeg, and that at Morden, and the registry offices at Selkirk, Emerson and Stonewall, and any other governmental institutions in their district. Where should the line be drawn? An inspection of the land titles office would be a farce, and would an inspection of the provincial asylum be much better? And if the grand jury be entitled to inspect the land titles office at Winnipeg, then they would also be entitled to go away off to Morden, to Emerson, to Stonewall and to Selkirk, and keep junketting and philandering about for a couple of weeks. At whose expense? We would like to know what right the grand jury have to call upon the government to provide conveyances and drive them 25 miles to the provincial asylum? Is this customary elsewhere? We would be obliged if any of our readers could enlighten us, as we have not been able so far to find any authority to support the grand jury in their demand. The results of such a visit would be barren, and no inference unfavorable to the asylum could in any degree of fairness be drawn from the refusal of the government to comply with such a demand.

AN AMAZON AT THE BAR.

The Chicago *Legal Adviser*, September 28, states that "lawyer Kate Kane broke her parasol on the head of lawyer Dennison after she had applied to him with her juridicial tongue the smashing appellation of 'black vagabond' and something more," whereupon she was fined for contempt of court. Now "lovely woman" at the bar is out of place even when she conducts herself as she usually does, but the prospect of arguing a legal point against a fair dame such as "lawyer Kate Kane" is somewhat

alarming. One would be very chary of taking exception to a plea of the playful Kate's when the chances are she would jab you severely in the waistcoat with her *en tout cas* by way of reply; and who would venture to differ on the construction of a statute with a person who might catch you a "three-bagger" on the nose with the Constitutional Limitations of Mr. Cooley or "do you up" generally with the Statutes at Large, by way of an answer? No, sweet Kate, the old way is exciting enough for us, and we think you were intended for what is known to the sporting fraternity as a "fancy scrapper" rather than a disciple of the immortal Blackstone.

THE EFFECT OF CROSS-EXAMINATION.

We were interested in reading in a contemporary lately some illustrations of the effect of good cross-examination, which called to mind an incident, the occurence of which we can personally vouch for.

In an action in the Queen's Bench, here, on a promissory note, the defendant denied the making in a most positive manner and repudiated the signature most emphatically. The cross-examining counsel, Mr. Howell, Q.C., having been supplied with a number of the witness' signatures, proceeded to examine him as to their genuineness by submitting them to his inspection through a piece of card board with a hole so cut in it as to allow only the signature being seen. The witness was at first very positive and swore away merrily enough, but by a little skilful manipulation he became a confused and at one time admitted the signatnre in dispute to be his, but promptly repudiated it when he found out his mistake. Then he got hopelessly mixed, then sulky and would not answer, and at last, becoming excited and enraged at repeated slips and feeling that he had been exposed, he lost control of himself, danced about in the witness box, abused

the counsel, and finally bolted out of the court room and dashed up the street followed by the unrestrained laughter of the whole court.

BEWARE, COLLECTION AGENCIES!

The attention of these gentry, who are at present operating on such a large scale in this city, is called to the following extract from the *Canada Law Journal* for Oct 1:

The devices of the unprofessional debt collector are sometimes ingenious, but occasionally rather disastrous in their results, "the engineer being hoist with his own petard." This was the case in *Green* v. *Minnes*, 22 O. R. 177, where a creditor having an account against a debtor which which he was unable to collect in the ordinary way placed it in the hands of "The Canadian Collecting Co." This company, in order to coerce the debtor into payment, threatened (and subsequently carried out the threat) to advertise the debt for sale "on every bill board in the city." Happily, however, the amount advertised as due was larger than the amount of indebtedness the creditor was able to prove, and the publication was therefore held libellous, and the defendants were mulcted in $50 damages and full costs of the action.

And isn't this, which appeared in a daily paper on the 24th October, a gem?

A TERROR TO DEAD-BEATS.

THE EVER-PERPLEXING PROBLEM OF MAKING COLLECTIONS PERMANENTLY SOLVED.

The Consolidated Adjustment Co., of Chicago, whose travelling representatives have been interviewing the prominent business and professional men of this city for the past month, promises to bring consternation to that numerous class of people who contract bills with the intention of never paying them unless forced to do so. Their methods, while complying strictly with *all the provisions of the constitution* of the United States as well as Canada, all the postal laws and regulations of this country and the United States, and the statutes of the various provinces and states in which they do business, promise to reform or ostracise and banish that class of human leeches that afflict every business community, and are a burden, a nuisance, and often the ruin of merchants doing a credit business. Their work here in the past few weeks, *unlike that of similar institutions*, has been marvellous and most satisfactory to our merchants.

Accounts, notes and judgments that had grown musty and yellow with age, and had withstood all efforts of the collector, constable and sheriff for years, have been, through through the medium of this agency, converted into new, crisp bank notes.

Statutes of limitation and exemption laws are no barriers to the prosecution of claims through their system, and while they have a pecuniary interest in prosecuting their work, they deserve the good-will and support of business men and all honest people everywhere.

The italics are ours; the bad grammar is the Company's.

THE MICHIGAN LAW JOURNAL AGAIN.

The Michigan Law Journal instead of straightforwardly acknowledging a patent misstatement it made in regard to this journal a little while ago, indulges in its last issue in more jugglery.

By the ingenious, but not altogether creditable, device of changing the words "only two *numbers*," lately used by us (September) in referring to the backward state of our law reports, into "only two *volumes*" it perverts our plain meaning and builds up the foundation for the allegation that we in Manitoba present "the rather peculiar spectacle" of complaining of a lack of reports, and pats itself on the back by remarking that *it* has to complain of the multiplicity thereof.

No, engaging contemporary, we would be more than satisfied if we received one volume of reports in the year, but what we did object to was having to pay $1300 for two *numbers* of a volume. And you are right in saying that there is a "rather peculiar spectacle" presented in this little matter but you do not appear to realize the fact that *you* are "the show."

APPOINTMENTS.

September 30: To be inspector of County Court offices, Surrogate Court offices and Registry offices: Joseph Thompson, of Carberry.

October 1: To be sheriff of the Central Judicial District of the Province of Manitoba: Daniel McLean, of Virden.

October 17: To be Minister of the Interior, *vice* the Honourable Edgar Dewdney, resigned: Thomas Mayne Daly, Q.C., M.P., of the town of Brandon.

October 22: To be Clerk in Chambers of the Court of Queen's Bench, Winnipeg: Alexander J. Belch, *vice* Henry S. Sherwood.

October 22: To be stamp vendor and telephone messenger in the Court House at Winnipeg: Charles A. Boxer, of Winnipeg.

FLOTSAM AND JETSAM.

"CODICILS" TO AN AFFIDAVIT.

We take the following good story from the *Green Bag:*

A negro came before a justice of the peace and signed a pledge, promising to give up the use of all intoxicating liquors. Ten days afterwards the Judge met him, and, greatly to his astonishment, found him a good deal under the influence of liquor.

"Why, Erasmus," cried the Judge, "God bless me! how is this, and after your solemn affidavit too? You have broken your oath, Erasmus."

"Not at all, Jedge,—not at all, sir!" cried Erasmus, with alacrity. "De affidavy stands as when fust sworn and subscribed to: but bein' as you know, Jedge, a man of Websterian education, I have added a few trifling codicils to de original dockerments."

"Codicils, Erasmus,—what do you mean by codicils?"

"Well, Jedge, I'll explain; I'll give them codicils to you in the regular order. I've got the dockerment right here, and I've never let it go out ob my hands since I got it;" and Erasmus drew from over his heart the precious paper. With a grand flourish he read: "Codicil de fust—Dis codicil is to certify dat de meanin' and intent of the above insterment is hereby so moderfied an' set aside as to allow the affiant de triflin' indulgence of one cocktail befo' he go to breakfas'."

"Well, Jedge," said Erasmus, lifting his eyes from the paper, "that codicil appear ekal to the requirment of de subscriber for about fo' days; den we had," casting his eyes upon the paper, "Codicil de sec'un—De above affidavy an' codicil is hereby affirm an' am to remain in full fo'ce an' effec', 'ceptin' sich sections, claws, an' parts of clawses as would con-

flic' wid de allowance to de affiant of a appetizer before each meal, bein' tree drinks per diem, be de same more or less."

Here Erasmus again lifted his eyes from the document, and explained as follows:—

"On dis las' codicil de subscriber existed in tol'able comfort about fo' mo' days, when it not bein' found to rise to de hight of all demands, I felt obleged, Jedge, to add: 'Codicil de Third—All de above original dockerment an' codicils are hereby proclaimed to be of full fo'ce an' effec' pervided dat no part of dare contents be so construed as to interefere wid de inherin' right of de undersigned affiant and codicilist to partake of some sich suitable stimerlent as shall, in his judgment, be deemed necessary to de decent an' proper arousin' of de dorman' energies of his phiscal an' mental constitution.'"

"And is this the last of the codicils, Erasmus?"

"It's de finis, Jedge. It appears to fill all de 'quirements, an' is ekal to all de 'mergencies dat has yet arose."

RECREATIONS OF LAWYERS.

"The law," says Sir Matthew Hale, "will admit of no rival," or, as he elsewhere puts it, "Lady Common Law must lie alone." But in spite of these counsels of professional devotion, lawyers manage to put in a good deal of pleasure. They have always been a gay race with their solemn revels and their post revels, their masques and their dancings, from the time when Master Justice Shallow and Sir John Falstaff heard the chimes at midnight at Clement's Inn to the time when Thurlow, Pitt and Dundas galloped through the toll-gate in a tipsy frolic. Even the exemplary Evelyn laments, in his diary, that his time at the Middle Temple was spent mostly in "dancing and fooling." Perhaps the intellectual strain causes an inevitable rebound.

It is related of a certain Chancellor that, on coming out of court, he would, in the ecstacy of relief from the prolonged concentration of his faculties, throw his wig up in the air and indulge in a variety of extraordinary antics. There have been lawyers, of course, who were never tempted to turn such unjudicial summersaults, men whose avidity for such work was insatiable. Such was the cast-iron Brougham who, after a long day in court and in the House, refreshed himself by sitting up all night to write papers on optics or articles for the *Edinburgh*. Such was the immortal Coke who never allowed himself any recreations at all, carefully eschewed the Shakespearean playhouse and spent his evenings laboriously noting up his Commonplace Book. Such, too, was Sir Matthew Hale, whose extra judicial excursions into the regions of theology, science and mathematics make up in themselves a formidable library. But these were "chosen vessels." The ordinary lawyer craves relaxation other than that of "dining with Coke," as Lord Elon called it, and being conditioned by his town environment he has to find it, in term time at least, in social

pleasures. In these, like Lady Teazle, he certainly bears his part with a very good grace. "Young man," said Sarah, Duchess of Marlborough, to the future Lord Mansfield, "young man. if you want to rise in your profession you must not sup out." The future Lord Mansfield knew better. He knew the value of society to a young lawyer, so he "drank champagne with the wits" at night; but he also got up early to read Roman Law. Mr. Justice Buller's idea of happiness was to sit at Nisi Prius all day and play whist all night, and the late Sir George Jessel's predilection for equity and whist was equally pronounced.

Lord Lyndhurst's evening amusements were whist, and oh! simplicity of true greatness! *backgammon*. How much nearer does this little glimpse of domesticity seem to bring us to the "Nestor of the House of Lords," especially when we are told that he played both games very badly and did not at all like being beaten. It is as refreshing as Erskine's description of himself just after the Horne Took trial, as "very busy flying my boy's kite." Fearne, of Contingent Remainders fame, found his "dissipations," as he called them, in a variety of ingenious inventions from a machine for transposing keys in music to a method of dyeing cotton stuffs. In his time, that terrible infliction, evening sittings at the Rolls, prevailed, and very much they must have marred the evening's amusement of the Chancery Bar. Evening consultations were matters of course with the Bar generally, even down, so the late Sir Frederick Pollock tells us, to 1845. Lord Camden, like Lord North, devoted himself to music as a relaxation from study, and strange as it may appear, music had charms for the rugged Thurlow. When he came into the drawing-room after dinner he generally put his legs on a sofa and one of his daughters played on the pianoforte some of Handel's music, and though he might sometimes appear to be dozing, if she played carelessly, or music he did not like, he immediately roused himself and called out, "What are you doing?" Another way which Thurlow had of relieving his *ennui* when ex-Chancellor, was getting young lawyers to come to him in the evening to tell him what had been going on in the Court of Chancery in the morning. On these occasions he was in the habit of censuring very freely the decisions of his successors. This was at all events better taste than that of Jeffreys, C. J., who used to keep a mimic to amuse his evenings by aping the judges and great lawyers of the age; but how much more innocent than both was the device of good old Sir Matthew Hale, who "*by way of ensuring entertainment at home, would keep a monkey or a parrot.*"

Lord Campbell tells us that his chief amusement when a judge on circuit was in wandering about the town incognito, like Haroun al Raschid, and observing the manners of the people.

Sir Walter Scott tells a very grim anecdote of a chess-playing Scotch judge—one Braxfield. Braxfield, whenever he went on a particular circuit, was in the habit of visiting a gentleman of good fortune in the neighborhood of one of the assize towns and staying at least one night, which,

being both of them ardent chessplayers, they usually concluded with their favourite game. One spring circuit the battle was not decided at daybreak, so the Lord Justice said, "Weel, Donald, I must e'en come back this gate in the harvest and let the game lie over for the present," and back he came in October, but not to his old friend's hospitable house, for that gentleman had, in the interim, been apprehended on a capital charge of forgery, and his name stood on the Porteous Roll or list of those who were about to be tried under his former guest's auspices. The laird was indicted and tried accordingly, and the jury returned a verdict of guilty. Braxfield forthwith put on his cocked hat (which answers to the black cap in England) and pronounced the sentence of law in the usual terms, "to be hanged by the neck until you be dead; and may the Lord have mercy upon your unhappy soul!" Having concluded this awful formula in his most sonorous cadence, Braxfield, dismounting his formidable beaver, gave a familiar nod to his unfortunate acquaintance and said to him, in a sort of chuckling whisper, "And now Donald, my man, I think I've checkmated you for ance."

The very town life which lawyers mostly lead makes them more keenly alive to the charms of the country. (Have not the best landscape painters been town bred?) Rural scenes and sports please them as Tennyson tells us they pleased Arthur Hallam the young Chancery barrister—

"fresh from brawling Courts
And dusty purlieus of the law."

Of these country pastimes one can only say, with Selden, that "One man's pleasure lies one way, another's another." In a profession so full of distinguished athletes as the law every sport finds its votaries, golf, tennis, shooting, fishing, yacting, Alpine climbing, cricket, football, rowing. If there is one of these favoured par excellence by the legal taste it is probably shooting. It falls conveniently in the Long Vacation, and it requires what lawyers usually possess—presence of mind and a good nerve. It has a dash of excitement, too, without the hazard of hunting or of Alpine climbing, for a lawyer carries his caution into his pleasures. Sir Henry James' battues are famous. The late Lord Justice Cotton was an excellent shot. So was Lord Westbury, though there are stories current of his having occasionally bagged a beater or a keeper. Lord Westbury was never one to "suffer fools gladly" in shooting or anything else, as the following illustrates:—

"A Greek nobleman, Count M———, an old friend of his, used to shoot sometimes at Hackwood. The Count, besides being a very bad shot, was wont to fire in a wild and dangerous manner, and Lord Westbury delighted in 'wiping his eye.' One day, the Count, after missing every shot he had, severely peppered one of the dogs, and then twice claimed for himself birds which had dropped to his host's gun. He capped this performance a few minutes later by nearly settling the whole line of shooters' keepers and beaters in a turnip field, his previous misdeeds and

the wiggings he got for them having made him completely lose his head. This was too much for Lord Westbury, who at once ordered a keeper to take from the excited and protesting Count his gun and cartridges, and sent the offending sportsman home to the ladies, to the great amusemenf and relief of the rest of the party."

The incident vividly recalls a celebrated occasion on which Mr. Pickwick administered similar summary justice to the unfortunate Winkle.—*Law Gazette.*

A VALUABLE LAW LIBRARY.

Mr. Charles J. Buchanan, surviving partner of Mr. N. C. Moak, the author of many legal works, writes the following:

"Owing to Mr. Moak's death, his law library will soon be offered for sale. Mr. Moak had been carefully collecting this library for many years. It is believed to be the completest and largest private collection of law books in America. Few of our State libraries can compare with it.

"It contains the United States Supreme Court, Circuit and District Court reports, also the reports of all the States in the Union, also those of England (including Law, Equity, Probate and Divorce, Admiralty and Colonial), Scotland, Ireland and Canada. The library also has a fine and extensive collection of digests, legal periodicals, criminal trials, briefs, cases and text books upon all the current topics of the law and a full set of New York Session Laws. The books were well cross-referenced and annotated under Mr. Moak's own supervision. The actual cost of the library was upwards of $65,000.

"This is the rarest opportunity ever offered to procure at once a complete and extensive law library which has taken years to accumulate. The library will be sold all together as it is, should a fair offer be promptly made for the same."—*Chicago Law Journal.*

BRIEFS.

MR. NICHOLAS FLOOD DAVIN, of Regina, has received a patent as a Queen's Counsel! Now, verily, this is "our place to laugh."

It appears that Saul also, in the person of Mr. J. R. Costigan, of Calgary, is "among the prophets." It is high time this Q. C. nusiance was abated.

THE following gentlemen were enrolled as advocates of the North-West Territories on the 10th of October:

Edward Corrigan Emery, of Edmonton.
George Smith McCarter, of Calgary.

On the 19th September:

Hugh Amos Robinson, of Regina.

MR. T. A. BERNIER, late registrar of the University of Manitoba, has been called to the Senate in the place of the late Senator Girard. We have heard it stated that Mr. Bernier was admitted to the practice of law in this province in the early days, but we do not find any record of such admission. Perhaps some of our readers will give us particulars. We understand that he was not an advocate of Quebec, but a notary merely.

OWING to the tenders received for the construction of the new court house addition being in excess of the appropriation, the plans will have to be altered and building operations deferred till next spring. This, however, does not justify the conversion of the present building into a root-house by storing a large quantity of potatoes in sacks for over two weeks *in the porch*, of all places! This may be all right for the White Horse Plains but is quite too rural for the metropolis. Who allowed such a thing to be done?

THERE ARE some noble faces in the group portrait of the six judges of the Superior Court of the City of New York (1855) given in the *Green Bag* for September. A relief truly from the heart-breaking physiognomies of the great majority of rough and ready law givers that generally grace the pages of our interesting contemporary.

WE ARE much obliged to the Toronto *Weekly Empire* for a copy of the large and beautiful photogravure of the Conservative members of the House of Commons. We

have never seen a finer piece of work of the class. It is presented to subscribers for 1893, but we do not see how the *Empire* can afford to do it.

THE Attorney-General of Ontario has called upon Sheriff Sutton, of Bruce, to resign in consequence of the report made by Mr. Æmilus Irving, Q.C., on an investigation held by him, on behalf of the government, to enquire into certain grave charges laid against the sheriff.

THE Statistical Year-Book of Canada, compiled by Mr. Sydney C. D. Roper, assistant statistician, is a most valuable departmental publication and the most convenient book of reference on Canadian affairs.

The *New Jersey Law Journal* states in its October number that it issues a "fine portrait" of one Mr. Grey. We have not received it, but possibly it is intended for "home comsumption" only.

THE *Legal Adviser* for the 5th instant has a well written article in which it sustains its opinion to the effect that the term "American" as applied to our Yankee friends is a misnomer and that they are really "a nameless nation."

MR. T. C. DOWN, of the Middle Temple, writes us to the effect that revising barristers do not in England wear their robes while presiding over their courts.

THE *Tribune* of this city, one of our valued lay exchanges, is now a really handsome paper in its new type.

AT THE Autumn Assizes lately holden in this city there was not one civil case tried.

REVIEWS.

THE LAW OF THE CANADIAN CONSTITUTION. By W. H. P. Clement, of Osgoode Hall, Barrister-at-law. Toronto; The Carswell Co., Ltd.; 8vo cloth, 1892.

"In this work," says our author, "I have endeavoured to exhibit, in as compact a form as the wide scope of the subject permits, the law of the Canadian Constitution in reference as well to our position as a colony of the Empire, as to our self-government under the federal scheme of the B.N.A Act," and he has very well succeeded in attaining this object in the neat volume of XXI and 672 pages before us. The book is divided into four parts, of which the first is Introductory, with chapters on, (1) Our political system, (2) The pre-confederation constitutions and (3) what became of them; the second part discusses The Results of our Colonial Status, with chapters on (4) What Imperial acts affect us, (5) The sources of our law, (6) The prerogatives of the Crown, (7) Executive checks on colonial legislation, (8) The Governor-General, and (9) Colonial legislative power; the third part deals with The Original Group, with chapters on (10) The division of the field, (11) Our judicial system, and (12) The B. N. A. Act, 1867; and the fourth with Our Subsequent Growth, with chapters on (13) The North-West Territories, (14) Manitoba, (15) British Columbia, and (16) Prince Edward Island.

While the author is not very happy in the beginning of his opening chapter, yet the general excellence and thoroughness of his work will quickly commend itself to the reader, who will not fail to appreciate these features as he advances. Chapter V., on "The sources of our Law," is among the best, as it gathers together the important Eastern

Canadian cases on the introduction of a system of laws by the early colonists, but it would perhaps have been better had this chapter been broadened in its scope so as to treat of the early laws of Manitoba also in that regard, instead of leaving them to be disposed of in a subsequent chapter. That great constitutional field, the B. N. A. Act, is really very ably treated in pages 241 to 546 inclusive, and much information valuable to the lawyer and the student has been gathered together. The Manitoba School Case receives due consideration, but is the statement on page 509, to the effect that the Parliament of Canada can remedy "clumsy and unworkable" legislation in regard to educational matters correct? The subsequent chapters are quite up to the standard of the prior ones. A very good view indeed is given of the history of the North-west Territories and Manitoba. It is not quite clear, however, from the expressions used on page 551, that the Hudson's Bay Company kept back, as they did, at the time of the transfer of Rupert's Land to Canada, in addition to the reserves around their forts, that great source of future wealth to them—one-twentieth of the Fertile Belt.

Any one who wishes to have an authentic and convenient account of the constitutional and legal history of any of the Canadian provinces cannot fail to be satisfied with Mr. Clement's work, as it is of real excellence and there is none other that takes up the same field or so readily furnishes the same information. It is an important addition to Canadian literature.

The index is not full enough for a work of this class. The binding is tasteful, but the paper is not what it ought to be, though the print is good and clear.

A MANUAL OF MEDICAL JURISPRUDENCE AND TOXICOLOGY. By Henry C. Chapman, M.D., etc., with thirty-six illustrations, some of which are in colours. Philadelphia; W. B. Saunders; 8vo, cloth, 1892.

The professional man never knows when he may require

the assistance of a work on the subjects ably treated by Dr. Chapman (who was coroner's physician of Philadelphia for six years) in the above very useful little work of 237 pages, but there is one thing certain: when he wants it he wants it badly, and he cannot do much better than to have this manual at hand at such a time. We candidly admit that we do not know enough of the subjects to justly weigh the merits of the book, but this at least we can say: that we have read it with much profit to ourselves and are very glad to possess it, for it takes a place of its own in that branch of literature of which it treats.

The binding is neat and strong, the print good, and the illustrations above the average; in many cases excellent.

THE BEST EDUCATION FOR A LAWYER. An address delivered on June 15, 1892, at the annual commencement exercises of the State University of Iowa. By Eugene Wambaugh, LL.D., professor of law in the State University of Iowa. Iowa: published by the University, 1892.

We beg to acknowledge receipt of the above handsomely printed and well gotten-up pamphlet. Though we have read it with interest, yet we do not agree with much that the professor says in regard to the collegiate system of legal training.

OBITUARY.

Sir William Johnston Ritchie, the second Chief Justice of the Supreme Court of Canada, died on the 25th of September last at Ottawa.

The deceased judge was a son of the late Hon. Mr. Justice Ritchie, of Nova Scotia, and a brother of the present Mr. Justice J. N. Ritchie, of the Supreme Court of the same Province, and was born at Annapolis on October 28,

1813, and educated at Pictou. Called to the bar in 1838, he took silk in 1854, and was elevated to the Supreme Court Bench of New Brunswick as a puisne judge on Aug. 17, 1855, eventually becoming Chief Justice of New Brunswick in December, 1865. He was raised to a position on the Bench of the Supreme Court of Canada on October 8, 1875, and on the death of Sir William Buell Richards, was made Chief Justice on January 11, 1879. He was knighted on November 1, 1881.

He was married twice, first to Mrs. Strong, of St. Andrews, N.B., and second to Grace Vernon, daughter of the late Thomas L. Nicholson, Esq., of St. John, and stepdaughter of the late Admiral W. F. Owen, R.N., of Campobello. He had 14 children, 13 of whom survive, and also his widow, to mourn his loss. Before his elevation to the bench, he had taken an active intertst in politics, and represented the city and county of St. John for many years in the local assembly.

The bench of Canada can ill afford his loss, for his abilities were of a high order, and though he had a very proper sense of the importance and dignity of his high position, yet that did not prevent his always acting towards the bar with becoming courtesy and attention, and his absence will be much felt by those who practised in his court.

Following the rule he himself laid down on the death of the former Chief Justice, and of the late Mr. Justice Henry, the Supreme Court judges did not adjourn the court nor make any public reference to his death. This rule does not meet with approbation and might with advantage be abrogated. However, the judges of his court did send an address of condolence to his widow.

THE

WESTERN LAW TIMES

OF CANADA.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. NOVEMBER, 1892. No. 11.

DE PRÆSENTI.

THE RE-DIVISION OF THE COUNTY COURTS.

In the *Manitoba Gazette* for the 19th instant an announcement is made that pursuant to an order-in-council of the 17th instant, the province will be re-divided into judicial divisions for county court purposes. This is needed, but a strange thing is that the divisions are not geographically mentioned so that any suitor can ascertain them, but are only referred to as "being delineated and marked upon a map annexed" to the order-in-council. How is the public to know the boundaries of the respective courts? And suppose the map should be destroyed? A nice question truly if the jurisdiction of the court be called in question; in such case how will the boundaries of the judicial division be proved? The map cannot be taken from the Provincial Secretary's office and yet the boundaries do not appear in the *Gazette*. This should be attended to before the order comes into force on January 1 next, or there will be the greatest confusion and no one will know where to bring his action.

THE JUDGES AND PROHIBITION.

The Hon. Messrs. Justices Killam and Bain, puisne judges of the Court of Queen's Bench for this province, were examined before the Prohibition Commission, which sat in this city at the close of last month. The evidence of the learned judges does not go to show that whiskey plays that important part in the tragedy of crime which it has been assigned, at least in Manitoba.

We take the report from the daily press.

(*Free Press* Oct. 27.)

HON. MR. JUSTICE KILLAM

had been in Manitoba nearly fourteen years. He was born and grew up in Nova Scotia, studied law in Ontario and practised there and here; and had been a judge since the beginning of 1885. He thought there had not been very much change in the social customs of the people in regard to the use of intoxicating beverages; he considered Winnipeg a sober, well-conducted place. He visited officially also Portage la Prairie and Brandon; the state of things there was very good, the people were very orderly and sober on the whole, and there was very little crime. Not a very large proportion of the criminal cases that came before him were attributed directly or indirectly to intemperance. He gave an analysis of fifty-three cases that had come before him, twenty-eight of them having been criminal convictions and twenty-five acquittals. Of the convictions four were due to drinking; nineteen were not in any way attributable to that, and five were doubtful, three of them having pleaded guilty, and no records having been taken from which it could be judged, one being larceny of liquor and one of indecent assault, in which there was evidence of the prisoner having been drunk. Of the twenty-five prisoners acquitted, four ought, in his opinion, to have been found guilty, but the acts were not traceable to liquor; that was for an act committed in a drunken row. In eight cases in which there was strong evidence against the prisoners, there was no evidence of the use of intoxicating liquor. There were two cases in which the prisoners were apparently guilty of fraudulent acts not within the law, but they were not drunk; in one of assaulting a constable, the indictment was wrongly drawn; two were for rape, in which there was not sufficient evidence of want of consent. In the other cases, except those, there was no evidence of the use of intoxicating liquor. He thought habitual drunkards had better be put under some restraint. He had been occasionally, temporarily, in countries where there was prohibition. In Yarmouth, N. S., where there had been no licence within his recollection, he had, when a boy, heard places commonly talked of where liquor was sold illicitly. He had passed through

the State of Maine, and had seen liquor sold quite openly where he had understood prohibition was in force. He had been at Fort McLeod, N.W.T., and a day or two at Calgary; he had never himself seen liquor sold, but had had evidence of parties having used it, and had known it to be freely used, He had seen bars more expensive apparently than would have been required to sell liquors that were not intoxicating. In Colchester, county of Essex, where it was attempted for a year or two to enforc the Duncan act, he had seen liquor sold. He could only reason theoretically on the advisability of a prohibitory enactment; he thought it would be so extremely difficult a thing to enforce it, as to be almost impossible. So large a number of people wished to purchase liquor as to make it an object to endeavour to supply the demand; and in the condition of society it would be difficult to prevent this. He considered that the effect of a law flagrantly and persistently violated would be demoralizing to the community in the sense of blunting the respect for law. He thought brewers and distillers should be compensated for their plant and property in the event of prohibition being adopted. On the question of prohibition he would say that, as a large number of persons desired to use intoxicating liquors it would be an undue act of authority on the part of the majority to prevent them from obtaining it.

To Dr. McLeod.—He hardly knew whether he would regard Manitoba as strongly in favor of prohibition, in view of the plebiscite; the result of that vote had certainly been a surprise to him. He had thought it would not give a very clear idea of the views of the people, as it was not bringing prohibition into practical operation. Even if as large a majority as two to one desired prohibition, he would not say that prohibition would be a proper thing, but it would be an undue exercise of authority. He did not think that majority would be a very good evidence of the practicability of prohibition, as it would be the result of enthusiasm at the start. It was a natural right that a man should have intoxicating drink if he wished. He repeated this as his answer to Dr. McLeod's concluding question whether the majority of the people had not a natural right to protect itself and the material and moral welfare of the boys and girls constantly menaced by the liquor trade, which the minority should not infringe.

(*Tribune*, Oct. 28.)

HON. MR. JUSTICE BAIN,

said he had occupied a seat on the bench for five years. He had resided here 20 years. A licence law was then in force. He had no knowledge of the working of the Scott Act in Manitoba. His own experience in Manitoba was that there had been a marked change in the drinking habits for the better. He had always understood that it was easy enough to get liquor on Sunday, contrary to the law. He thought it a beneficial law which prevented the sale of liquors in grocery stores. There was less excuse for a saloon bar than for a hotel bar. He was in

favour of high licence if there was to be any at all, with rigid and very strict enforcement. He believed from his own experience that Manitoba would compare very favorably with any part of the Dominion in point of sobriety. He had known of many men who were kept going between the saloon, police court and the jail. He believed a man who was a habitual drunkard should be shut up; society must be protected. For some years he spent some time in France, Germany and Italy. He was struck with the contrast of the masses of the people there compared with the people of the United States. An enormous quantity of light wines and beer was drunk and there were none of the disgusting and demoralizing scenes which were witnessed where stronger liquors are drunk. He was in the prohibition state of Maine; liquor was obtainable in the hotel where he stopped. The sense of a community must be decidedly in favour of prohibition in order to carry it out successfully. He had not considered the question of remuneration to brewers and distillers. The non-observance of such a law as prohibition would be very demoralizing to a community.

To Dr. McLeod witness said that ever since he sat on the bench he was struck with the fact that so few of the cases were either directly or indirectly attributed to drink. There have been few cases of serious crime in Manitoba. He thought it likely that if there was more drunkenness in the province there would be more crime. If there was a prohibitory law well enforced benefits would result in some ways and not in others. The same difficulties would arise in enforcement as now exist in putting into effect the provisions of the Liquor Licence Act. Young men, he thought would be more liable to frequent the higher class liquor bar rooms than the 7x9. The man who had not the drinking habit strongly would not be liable to go to the disreputable drinking house. He had observed an increase in the use of alcoholic stimulants in France. He had visited the North-West, and had observed that the working of prohibition was not a success. The permit system was evidently abused; it struck him that he had never seen the use of liquor so demoralizing as it was in the North-West.

THE FROG AND THE BULL.

The *Albany Law Journal* administers a few paternal spanks to one Mr. Frank S. Rice, known to some as being the author of an indifferent work on evidence, for recently blackguarding the immortal Blackstone in an article in the *Columbia Law Times*. We do not think Mr. Rice will damage Blackstone's reputation to any appreciable extent, especially when he indulges in such "slush" as the following:

'We are grievously misinformed, our preconceptions are hopelessly awry, our theories, of which we have been excessively vain, are spectral inanities, if the average collegian, under the robust mental pabulum here outlined, doesn't wrestle with about all the "mental discipline" his god-like image cares to caress, at least until the fibres and the tendons of his callow years have attained a little more consistence and vigor. "Don't muzzle the ox that threshed out the corn" is the suggestive injunction of holy writ, and don't narcotize the gray matter in a student's skull with the putrefactions of a plodding brain that ceased to act long before the birth of our century.

Or when he says that the study of Blackstone

is now and ever shall be an imposition upon practical methods, a prostitution of mental energy, a useless and senseless parade of pedagogic whim-wham, that stuffs the receptive minds of our most brilliant and assiduous scholars with a pestiferous mass of unassimilative condiment.'

On reading the above the inquiry naturally suggests itself: What particular kind of "whim-wham" and how much of it has been utilized in the stuffing of Mr. Rice's mind? However, his performance with adjectives is at least equal to that of the illustrious Macphairson Clonglocketty Angus McClan on the bag pipes, concerning which we are told by the bard:

It was wild—it was fitful—as wild as the breeze
It wandered about into several keys;
It was jerky, spasmondic, and harsh, I'm aware:
But still it distinctly *suggested* an air.

THE LATEST CONSTITUTIONAL OUTRAGE.

The sleuth hounds at Ottawa have tracked down another unfortunate, in the shape of "James A. McLean, of the Town of Bridgewater, in the Province of Nova Scotia, Esquire, barrister-at-law," and succeeded, despite his frantic struggles in fastening upon him the degree of "one of Her Majesty's Counsel Learned in the Law." The solitary remaining practitioner in the Maritime provinces not called to that estate, became deranged at the prospect of a similar fate, and incontionently took to the woods armed with a howitzer and a keg of shingle nails, after announcing his determination of selling his life and honour as dearly as

possible. Indignation meetings are being held throughout the county, and strong resolutions have been passed condemning this method of persecution by arbitrarily exercising the Royal Perogative.

N. B.—This information has been received by us from our special correspondent over "Neebings Cable," *via* the Dawson route, and may be regarded as authentic.

A NEW ROOT OF TITLE.

An exchange is responsible for the following:

The laws of real property, as laid down by her British (*sic.*) majesty's authorities in New Zealand are frequently quite difficult of enforcement owing to the very original ideas of rights and titles entertained by the aborigines. Before the European can acquire a title of any sort to an inch of the Maori's land it is necessary that the native first have his claims settled by a court of competent jurisdiction called the "Native Land Court," and the tohungas, or learned authorities in Maori law, hold, for instance, that it is practically conclusive evidence of one's rights to hold land to have the former owner's body hung up as a parrot cage with parrots inside the ribs. This is a fact before the eyes of all and no one would dare to dispute the claims of the holders of such paramount evidence.

So in the pleadings before the native courts the occupant makes a speech after this fashion: "My ancestor conquered your ancestor and killed many of your tribe. He ate your ancestor's legs and arms, cut off and cured his head for an ornament, and of his chest, which was capacious and round, he made a cage in which to keep his decoy parrots, the ribs served as bars, from between which the parrot could look out, and many people came to admire my ancestor's parrot cage, and whose land was seised and held even unto this day."

This is one of the most satisfactory counts we ever read. It seems to cover the whole case. Messrs. Bullen & Leakes' annotators should add it to their admirable "Precedents."

NEW BOOKS AT THE LIBRARY.

The following books have been added to the Law Society's Library:

1. Beach's Private Corporations, 1891.
2. Black's Intoxicating Liquors, 1892.
3. British Columbia Statutes, 1892.

4. Bunyan's Life Insurance, 3rd ed. 1891.
5. Cartwright's Cases on B. N. A., vol. 4, 1892.
6. Chalmer's Bills of Exchange, 4th ed. 1891.
7. Coote & Tristram's Probate Practice, 11th ed., 1891.
8. Foa's Landlord and Tenant, 1891.
9. Ontario Statutes, 1892.
10. Story's Equitable Jurisprudence, 13th ed., 1886.

BRIEFS.

On the eleventh instant no less than 26 writs were issued out of the County Court of Selkirk.

THE *Chicago Legal Adviser* says that according to the last census there are 33,163 lawyers in the United States who receive $35,000,000 every year for fees, an income of about $1,100 to every practitioner.

AT the Michaelmas Sittings in Dublin, on October 25 ult., the new Lord Chancellor for Ireland took his seat and The Mac Dermot, Q. C., and Sergeant Hemphill, Q. C., were called within the Bar as Her Majesty's Attorney-General and Solicitor-General for Ireland respectively.—Exchange.

WE beg to acknowledge, with thanks, from Mr. E. H. Fitch, a copy of his excellent paper entitled "The Torrens System of Land Transfers," read before the Ohio State Bar Association on July 14 last. Mr. Fitch is doing a good work in endeavouring to introduce the Torrens Act into Ohio, and his fellow practitioners should, and doubtless will support him.

THE *Canada Gazette* for the 5th instant erroneously describes the Hon. Mr. Bernier as a barrister of this province. He was admitted as an attorney in Michaelmas Term, 1885. Mr. Bernier writes that he was admitted as an advocate of Quebec in July, 1869. He retains his position as registrar of the University of Manitoba.

THE
WESTERN LAW TIMES
OF CANADA.

"We will sell to no man, we will deny no man, or defer right nor justice."
—Magna Charta.

VOL. III. DECEMBER, 1892. No. 12.

The Hudson's Bay Company's Land Tenures and the titles of the Selkirk Settlers.

1. *Of the grant of Assiniboia to the Earl of Selkirk and its occupation by his settlers.**

While the origin and progress of this great and enduring corporation have received no little attention from the pen of the historian, and while its struggles, prosperities, and adversities have been more or less faithfully recorded and a halo of romance thrown round its operations in the barter of its costly furs, yet that portion of its possessions more lasting than all—its land—has received but scant consideration, and presents almost a new field, and not a lean one, to the inquirer into the true state of affairs under the old *régime*.

This subject differs from all these others in that it is a thoroughly practical one—a live issue of the day—and of very great interest, pecuniary in most cases, to those who came to the District of Assiniboia under the auspices of Lord Selkirk or the Company. As an illustration of this assertion, if such were needed, it is only necessary to refer to the proceedings before our courts of law. Quite lately

*Read before the Manitoba Historical and Scientific Society on Dec. 1st, 1892.

the question as to whether the law of primogeniture was in force here prior to the Transfer was before the judges of our Queen's Bench (*a*) and it was held that it was in force if such estates existed as it could operate on. If their existence can be proved, then many of the patents granted by the Dominion Government to the representatives of Red River settlers have been granted in error, and why might not such a mistake have occured as regards lands of immense value situate in the heart of Winnipeg as well as the sorry claim of the meanest of Lord Selkirk's settlers?

That many such mistakes have been made by the Crown is an open secret among the legal profession, and that the officials of the Land Titles Office realize the importance of the question is evidenced by the fact that, going behind the Crown grant, they procure from Ottawa the papers and documents on which the patent was granted, and, quite independent of the investigations of the Crown officials at Ottawa, and with far more experience in the matter, subject the evidences of title to the most rigorous scrutiny. Even now "uneasy lie the heads" of many landowners in one of the most valuable residence portions of the city, Fort Rouge, because of the outstanding interest of a poor half-breed girl who long ago went to the Saskatchewan but may unconsciously have left her children a rich inheritance.

In a former series of papers entitled "The Rise of Law in Rupert's Land," (*b*) the conclusion was come to that in all probability a court of law in this province would find that the grant of lands to the Company under its charter, May 2, 1670, was valid, though the monopoly in trade was not. For the reasons for coming to this conclusion reference must be made to the papers themselves and it does not seem necessary to refer to them other than to say

(*a*) *Re Tait*, vol. I., pp. 76, 158 (Reports).
(*b*) Vol. I., pp. 49, 73, 193.

that a careful consideration of the other charters (c) of the American plantations or colonies confirms the writer in the belief that they were not inconsistent with the age in which the grants were made, in fact were recognized as a prerogative of the Crown. And there is also this other circumstance of no little significance that while in many cases the grantees of the other American charters were people of small consequence and presumably little influence, in some cases apparently of none, not even a City knight among the proprietors, yet those of the Bay Company included personages of the very highest rank, a Prince of the Blood—from whom the plantation derived its name, Rupert's Land—at the head of them, and it is surely not unreasonable to assume that in such a case the sovereign meant to clothe such royal "adventurers" with the very greatest powers he could by exercise of his prerogative in that behalf.

These companies bore similiar names to the full name of the Hudson's Bay Company. For instance, that of Virginia, under its second charter, was styled the "Treasurer and Company of Adventurers and Planters for the City of London, for the first colony in Virginia"; that of Massachusetts Bay: "The Governor and Companie of the Massachusetts Bay in New England"; that of Connecticut: "The Governor and Company of the English Colony of Connecticut, in New England, in America"; another "The Governor and Company of the English Colony of Rhode Island and Providence Plantations, in New England, in America"; another "The Trustees for establishing the colony of Georgia in America"; and so forth. The Maryland Charter, 1632, of Charles I to Lord Baltimore, was most remarkable in its amplitude, going even to the extent of empowering the grantee to invest the inhabitants

(c) *Vide* Charters of the Old English Colonies in America. By Samuel Lucas, Esqr., of the Inner Temple, Barrister-at-law, London, 1850.

"with what titles and dignities soever as he shall think fit (so they be not such as are now used in England)," and to a lesser degree was also that famous one granted to Sir William Penn by Charles II eleven years *after* that of the Bay Company. His sovereign appeared particularly desirous of doing honour to Lord Baltimore for we find this quaint expression: "Now, that the said country thus by "us granted and described *may be eminent above all other* "*parts of the said territory, and dignified with large titles,* "know ye, that we, of our further grace, certain knowledge "and mere motion have thought fit to erect the same "country and islands into a *Province*; as out of the fullness "of our royal power and prerogative we do for us our "heirs and successors erect and incorporate them into a "province, and do call it Maryland, and so from henceforth "we will have it called." Penn received a somewhat similar honour in the case of his grant, but not in such sounding terms, though he was empowered to erect manors and to hold Courts Baron in each and every of them so erected.

The Governor and Company of the Hudson's Bay Adventurers were "made created and constituted" . . "the true and absolute lords and proprietors of" Rupert's Land and held that plantation "as of our manor at East Greenwich, in our county of Kent, in free and common soccage, and not in capite or by Knights service, yeilding and paying yearly to us, our heirs and successors, for the same, two elks and two black beavers, whensoever and as often as we, our heirs and successors shall happen to enter into the said countries, territories and regions hereby granted." The three Virginia charters were held of the same manor and by the same tenure, paying a fifth part of the gold and silver and, originally, one fifteenth of the copper; so were Massachusetts (1st and 2nd charters), Connecticut and Rhode Island, while those of Maryland and Pennsylvania

were held "as of our Castle of Windsor in our county of Berks," that of Maryland at "two Indian arrows of those parts" in addition to the fifth part of the gold and silver, and in Penn's charter two beaver skins took the place of the arrows, but, differing in this respect from the Company's charter, they were to be delivered at Windsor Castle before the first of January; Georgia's "Trustees" held their charter (1732) "as of our manor of Hampton Court in our county of Middlesex" likewise in free and common soccage at "the sum of four shillings for every hundred acres of the said lands which the said corporation shall grant, demise, plant or settle, the said payment not to commence or be made until ten years after such grant demise planting or settling."

The Company, then, being "the true and absolute Lords and Proprietors of Rupert's Land, in free and common soccage," on the 12th day of June, 1811, "granted, aliened, enfeoffed and confirmed" unto the Right Honourable Thomas Earl of Selkirk, his heirs and assigns forever, all that tract of land or territory, comprising about 116,000 square miles, bounded by an imaginary line running as follows, that is to say:

beginning on the western shore of Lake Winnipie, otherwise Winnipeg, at a point in fifty-two degrees and thirty minutes north latitude, thence running due west to the Lake Winnepigoos, otherwise called Little Winnipeg, then in a southerly direction through the said Lake so as to strike its western shore in latitude fifty-two degrees north, then due west to the place where the parallel of fifty-two degrees north latitude intersects the western branch of Red River, otherwise called Assiniboine River, then due south from that point of intersection to the Height of Land which seperates the waters running into Hudsons Bay from those of the Missouri and Mississippi, then in an easterly direction along the said Height of Land to the source of the River Winnipie or Winnipeg (meaning by such last mentioned River, the principal branch of the waters which unite in Lake Saginagas), then along the main stream of the waters and the middle of the several lakes through which they flow to the mouth of the Winnipeg River and thence in a northerly direction through the middle of Lake Winnipie to the place of beginning.

An important reservation in favour of the grantors was made in the following clause:

Saving and reserving nevertheless to the said Governor and Company and their successors all *rights of jurisdiction* whatsoever granted to said company by their charter.

This is why the governors of Assiniboia received their commissions from the Company and not from Lord Selkirk.

One tenth of the said tract was to be set out by the Earl, at the request of the Company "to the use of such person or persons, being or having been in the service or employ of the said Governor and Company for a term not less than three years immediately preceding the date and execution of any direction or appointment to be made by the said Governor and Company and their successors under this present power, in such parts, shares, and portions *and for such estates and interests* as the said Governor and Company . . . . shall from time to time . . . . direct or appoint. Nevertheless, so that no person taking under any such direction or appointment and being under the rank or degree of Master of a trading post, shall be or become entitled to any greater part share or proportion than two hundred acres, nor any person of the rank or degree of Master of a trading post any greater part, share or proportion than one thousand acres."

Then follow certain conditions to be performed on behalf of the Earl, in default of which, after due notice on the part of the Company and three years subsequent neglect to perform on the part of the grantee, it would be lawful for the Company to revoke the grant, but even in this case "subject and without prejudice to any such grant as shall have been previously made by the said Earl, his heirs or assigns to or in favour of any person or persons, so as upon the land comprised in any such grant there be actual settlers to the amount of one family for every five thousand acres."

It is not, however, necessary to further notice these conditions for there is no evidence whatever that the Company ever required the Earl to perform them, in fact from subsequent occurences the presumption is the other way. Any one wishing to refer to the deed will find it printed in full in the 36th Transaction of this society.(*d*) It is to be regretted that while Mr. James Taylor, who furnished the copy of the deed from which this Transaction was printed, took the late Governor Morris to task for suppressing parts of the above deed and a map in his "Treaties of the Indians," pp. 14, 300-1-2, yet he did not furnish to the Society, so far as appears from the Transaction, the source from which he derived the document which he stated was a copy of the original deed. This fact is the more unfortunate as it is most important that we should be certain that the document printed by the Society as being a copy of the deed is truly a copy. It may be fairly presumed that the original is at the Company's head office in London with the rest of the title deeds, as it was in all likelihood returned to them by Lord Selkirk's executors when they resumed possession of the estate by arrangement come to between them as hereinafter mentioned.

In August, 1812, Miles McDonnell, formerly captain in His Majesty's Regiment of Royal Canadian Volunteers, who had in June, 1811, been appointed by the Company as Governor of the District of Assiniboia, (*e*) the name bestowed on the territory, and by Lord Selkirk as his agent and superintendent, arrived at Red River and took possession of the lands in the name of his master, (*f*) and "on or about the 4th of September ensuing, caused the grant "of the Territory by the Hudson's Bay Company to the "Earl of Selkirk to be read, together with his own com-

(*d*) Manitoba Historical and Scientific Society.

(*e*) Statement respecting E. of Selkirk's settlement, 1817, p. 3. Parliamentary Report, 1819, p. 145.

(*f*) Parliamentary Report, 1819, p. 154.

"mission as Governor, at a public meeting called by him "for that purpose," at which time and place also, and as Lord Selkirk's attorney as provided in the deed, he received at the hands of William Hillier, acting on behalf of the Company, formal and peaceable possession of the before mentioned lands. These ceremonies were followed up by a salute from the guns of the neighbouring Fort Douglas.

As the term "District of Assiniboia" is apt to be misunderstood, it may be as well to distinguish between its two widely dissimilar meanings. The matter is thus explained by the first Recorder of Rupert's Land, Mr. Thom: (g) "Assiniboia is the common name of two very different districts, the judicial and the municipal. In the Honourable Company's resolutions of 1839, for the appointment of a governor, a council, and two sheriffs, the judicial district is described to be such portion of Lord Selkirk's original grant as may be within Her Majesty's dominions; whereas in the local regulations of 1841, the municipal district is limited to a circle of a hundred miles in diameter, with the Forks as a centre. * * * Of the judicial district thus defined, the municipal district forms hardly an eighth part, and it would have been manifestly absurd and preposterous to extend our local regulations over so wide and wild a surface."

While all the allotments of Lord Selkirk or his executors were comprised within the municipal district, yet some of the later grants of the Company were outside of it. It will be observed that a portion of the Earl's domain lay within the territory of the United States, and his grant was inoperative to that extent, the error arising from ignorance as to the international boundary, the exact location of which was not established till many years after, when Fort Daer (Pembina), which was found to be beyond the boundary, had to be abandoned.

(g) Charge to the Grand Jury of Assiniboia: 20 Feb. 1845. London, 1848.

It is only reasonable to assume that Governor McDonnell allotted at once to the settlers who accompanied him their respective lands and pursued the same course to those who followed later on; in fact, he states that "the emigrants that arrived last from Sutherlandshire, after seeing the country and *being put in possession* of their different allotments of land, were so pleased with the flattering prospect before them that they wrote home to their friends," etc. (*h*) It also appears that in the summer of 1813 or 1814, "the surveyor of the colony, in laying out some lots for settlers, insisted upon running one of his lines through the middle of the garden of the North-West Company's post, which after some opposition was submitted to."(*i*)

In his prospectus (*j*) of the colony, Lord Selkirk had announced that to the "settlers lands will be disposed of, either in the *way of sale* or lease in perpetuity, at the option of the settler, on terms very encouraging to him," etc. The settler was to be provided with a free passage for himself and family, at an estimated cost of £10, and the price of the land was "to be 10*s*. per acre, if sold, or if leased in perpetuity, 1*s*. per annum; every family of settlers may be expected to take up at least 100 acres. They are allowed some accomodation of time for the payment, and 100 acres at the above rate will amount to £50, a nett advantage of £40 after reimbursing the charge of bringing in the settlers. If he should prefer leasing, his rent will in two years repay the charges and will remain afterwards as a clear income to the Proprietor."

The settlers, however, encountered considerable opposition at the hands of the North-West Company of Montreal and differences arose between Governor McDonnell and the representative of that company, which resulted in the serving by McDonnell of the following notice:

(*h*) Report 1819, p. 28.

(*i*) Report 1819, p. 159.

(*j*) Narrative of Occurrences, App. p. 5. London, 1817.

DISTRICT OF ASSINIBOIA. } To Mr. Duncan Cameron, acting for the North-West Company at the Forks of the Red River:

Take notice, That by the authority and on the behalf of *your landlord*, the Right Honourable Thomas Earl of Selkirk, I do hereby warn you, and your associates of the North-West Company, to quit the post and premises you now occupy at the Forks of the Red River, within six calendar months from the date hereof.

Given under my hand at Red River Settlement this 21st day of October, 1814.

(Sgd) MILES MCDONNELL. (*k*)

The North-West Company refused to recognize this claim to the soil and the differences between the companies soon terminated in open violence, resulting eventually in the deplorable massacre of Seven Oaks on June 19th, 1816. During these conflicts the settlers were frequently disturbed in the possession of their allotments and it was not till the summer of 1817, after the proclamation of the Prince Regent, (*l*) commanding the contending parties to abstain from all further acts of hostility and restore mutually the places and property captured from each other during their recent disputes and remove all blockade or other obstruction interposed by them to the freedom of trade and intercourse with the Indians, and after the arrival of Commissioner Coltman and Lord Selkirk that they were left in undisturbed occupancy of their river farms.

Lord Selkirk, during his stay at Red River, took steps to settle the colonists on their lands in a permanent manner. Mr. Ross (*m*) relates the way in which this was done.

"His Lordship assembled the emigrants at a public meeting on the west bank of Red River some two miles below Fort Garry, and in consideration of the hardships, losses, and misfortunes they had from time to time suffered, he made them several concessions. To some, who had lost their all, he made a grant of land, comprising twenty-four ten chain lots, in free soccage, the holders merely conform-

(*k*) Report 1819–10.

(*l*) Trials–Report of, at York, 1819, Appendix 2. Rep. 1819, p. 94.

(*m*) Red River, p. 42.

ing to the conditions laid down in the deed of feoffment granted by the Hudson's Bay Company to the Earl. These lots were the only *free* lands granted to *emigrants* in the colony. They had lately been surveyed and marked off by Mr. (Peter) Fidler, on the left bank of the river, and two of them (Nos. 3 and 4) were designated by his Lordship as the sites respectively of a church and school for the colony. 'Here,' said his Lordship,—pointing to the lot No. 4, on which the company stood—'here, you shall build your church, (*n*) and that lot,' said he again, pointing to the next, being No. 3, 'is for a school.' Between the church and school lots there runs a small rivulet, called the Parsonage Creek."(*o*)

Ross also states (*p*)

'The lots alluded to, as the document (*q*) informs us, and which we shall transcribe for future reference, "are laid out along a line run by Mr. Fidler in the direction North 12° East, or thereby; lot No. 1 commencing at the distance of one mile, or thereby, from Fort Douglas," which fort was, at that time, situate on the south side or head of the point; "and lot No. 24 ending at Frog Plain. Each lot has a front of 10 chains, or 220 yards, a little more or less, along the said main line, except lot No. 12, which has only 5 chains. The division lines between the lots are at right angles to the main line, and are marked off towards the river by lines of stakes. Each lot is to extend to the distance of 90 chains, or 1,980 yards back from the river, so as to contain 90 English statute acres, besides which, each lot is to have a separate piece of woodland, containing 10 statute acres, to be laid off on the east side of the river, at any place which the Earl of Selkirk or his agent shall consider as most suitable for the purpose. These 10 acres are to be preserved by the occupier as wood-land, and not to be used for any other purpose. Till this wood-land be measured and marked off, the occupiers of the aforesaid lots will be allowed to take wood for building or fire-wood

(*n*) Where St. John's Cathedral now is.

(*o*) This creek crosses the main highway a little south of the new St. John's College, and falls between high banks into the Red River.

(*p*) Pp. 43-4.

(*q*) It is not stated what the "document" was, but it may be gathered from the following extract that it was a sort of formal declaration on the part of the Earl as to what his intentions were in regard to the lands of the settlers in general, and a recognition of the special claims of some of them,

from any place most at hand on the opposite side of the river. In case of the lands on the opposite side of the river being laid out in lots for settlement, the settlers in possession of the aforesaid 24 lots, shall have the first offer of purchasing the lots opposite to their own, and they shall not be disposed of at a cheaper rate to any stranger.

In consideration of the hardships which the settlers have suffered, in consequence of the lawless conduct of the North-West Company, Lord Selkirk intends to grant the aforesaid 24 lots gratuitously, to those of the settlers who had made improvements on their lands, before they were driven away from them last year; provided always, that as soon as they have the means, they shall pay the debts which they owe to the Earl of Selkirk, or to the Hudson's Bay Company, for goods or provisions supplied to them, or for other expenses incurred on their account.

(Signed) "SELKIRK."

Fort Douglas, Red River Settlement,
August, 1817."

About the same time Lord Selkirk concluded a treaty with the Indians by which their title to that part of the land occupied by the colonists was extinguished. Ross (r) gives the full text of the treaty as follows:

This Indenture, made on the 18th day of July, in the fifty-seventh year of the reign of our Sovereign Lord, King George the Third, and in the year of our Lord 1817, between the undersigned Chiefs and Warriors of the Chippeway or Saulteaux Nation, and of the Killistino or Cree Nation, on the one part, and the Right Honourable Thomas Earl of Selkirk on the other part. WITNESSETH, that for and in consideration of the annual present or quit-rent hereinafter mentioned, the said Chiefs have given, granted, and confirmed, and do by these presents give, grant and confirm unto our Sovereign Lord the King, all that tract of land adjacent to Red River and Assiniboine River, beginning at the mouth of the Red River, and extending along the same as far as the Grand Forks at the mouth of Red Lake River, and along Assiniboine River as far as Musk-rat River, otherwise called Riviere des Champignons, and extending to the distance of six miles from Fort Douglas (the first colony fort) on every side, and likewise from Fort Daer (at Pembina), and also from the Great Forks, and in other parts extending in breadth to the distance of two English statute miles back from the banks of the said rivers, on each side, together with all the appurtenances whatsoever of the said tract of land, to have and to hold for ever the said tract of land, and appurtenances, to the use of the said Earl of Selkirk, and of the settlers being established thereon with the consent and permission of our Sovereign Lord the King, or of the said Earl of Selkirk. Provided always, and

(r) Pp. 10-2.

these presents are under the express condition, that the said Earl, his heirs, and successors, or their agents, shall annually pay to the Chiefs and Warriors of the Chippeway or Saulteaux Nation the present, or quit-rent, consisting of one hundred pounds weight of good merchantable tobacco, to be delivered on or before the tenth day of October at the Forks of Assiniboine River: and to the Chiefs and Warriors of the Knistineaux or Cree Nation a like present, or quit-rent, of one hundred pounds of tobacco, to be delivered to them on or before the said tenth day of October, at Portage de la Prairie, on the banks of Assiniboine River. Provided always that the traders hitherto established upon any part of the above-mentioned tract of land, shall not be molested in the possession of the lands which they have already cultivated and improved, till his Majesty's pleasure shall be known.

"In witness whereof, the Chiefs aforesaid have set their marks at the Forks of Red River, on the day aforesaid.

(Signed) "SELKIRK."

Signed in the presence of Thomas Thomas; James Bird; F. Matthey, Captain; P. D' Orsonnens, Captain; Miles Macdonnell; J. Bste. Chr. De Lorimier; Louis Nolin, Interpreter; and the following chiefs, each of whom made his mark, being a rude outline of some animal.

MOCHE WHEOCAB (Le Sonnant).	OUCKIDOAT (Premier, alias Grande Oreilles).
MECHUDEWIKONAIE (La Robe Noire).	KAYAJIEKEBIENOA (L'homme Noir).
PEGOWIS.	

It is alleged that the meaning of the distance of two statute miles mentioned in the indenture was conveyed to the Indians by stating that they granted to the "Silver Chief"—Lord Selkirk—so much land back from the river as there would be at the farthest distance therefrom at which you could distinctly see a horse on the level prairie, or daylight under his belly between his legs. It is open to doubt whether the treaty so concluded was not incorrectly concluded by admitting the claim of the Saulteaux or Chippeway to an interest in the soil, whereas the Crees and Assiniboines, an offshoot of the Sioux, were the owners of the country so far as such wild people can be deemed owners, and the Saulteaux had not entered into the Red River country before 1780, when they were introduced thereto in the service of the North-West Company. (s)

(s) Ross, p. 13. Hargrave, Red River, pp. 6-7.

But it is not necessary to further consider this question of the Indian title—a right apt to be considered by civilized intruders on barbarous and ill defined territories as not a legal but a moral one barely entitling the inhabitants to some scant and tardy measure of consideration—as the claims of the Indians and half-breeds were ultimately investigated and allowed for by the Dominion Government on the transfer of Rupert's Land as will be hereafter mentioned.

Having seen, then, the settlers established in Assiniboia and holding under titles granted by the Earl of Selkirk, the grantee of the Company, and passing over for the present the investigation of the nature of such titles, it is necessary to determine for what period of time the Earl or his agents continued to grant lands to the settlers.

Under these grants, whatever they were, these settlers from the beginning took and (save interruptions before referred to) continued in possession of their farms. After the death of Lord Selkirk in 1820, and until 1824, his executors continued to deal with the colony as he or his agents had done before, but since the latter date its affairs had been entrusted to the Company's officers by the executors.(*t*) The settlement had cost the deceased nobleman, or his estate, a very large amount of money "from first to last" says Ross "no less a sum than 85,000*l.* "sterling; an amount the colony would not have realized had it been sold off at auction, even twenty years after it was founded." (*u*)

2. Of the possession of Assiniboia by the Hudsons Bay Company.

The result of the Earls scheme of settlement having proved so disastrous, negotiations were accordingly set on foot for a transfer of the colony to the Company. This

(*t*) Ross, p.155. (*u*) Ross, p. 171.

was eventually effected and the Company purchased from the executors in the year 1835 or 1836 all the interest of the Selkirk estate in the same and became the sole owners of the District of Assiniboia, thus revesting in themselves their old title thereto. It is only natural to assume that a transaction of such magnitude would be evidenced by indentures of some description but recent enquiry from the courteous secretary of the Company in London elicited the strange fact that the directors were unaware of any conveyance or relinquishment whatsoever from or by the executors to the Company, nor could he furnish the date on which the Company assumed possession of the colony, if indeed any formal resumption took place or were necessary under the exceptional circumstances of the District being under its control at the time.

(*To be continued.*)

DE PRÆSENTI.

THE FATHER OF THE BAR.

Who is the father of the Manitoba Bar? A statement recently appeared in the daily press that Mr. Wm. J. James, of Portage la Prairie, claimed that honour as the oldest practising barrister in the province, his predecessors being either dead, on the bench, no longer on the rolls, or "beyond seas." According to the rolls of the Prothonotary and the Law Society he is not entitled to claim that honour, as the name of Mr. Allan Macdonald, of Carberry, precedes his thereon. * Mr. James *may* be entitled to precedence over Mr. Macdonald, but there is nothing official recognizing such a claim and the onus is on him to prove it for the evidence is the other way.

ATTORNEY'S COMMISSION ON COLLECTIONS.

We have been asked to give our opinion as to what is a fair commission on collections as there is at present no charge recognized as customary by the profession. This is to be regretted and we think a uniform charge should be adopted which would be at least as high as that of the collection agencies who do not require to undergo a long probation as does the lawyer. They charge customarily as follows: On claims up to $100, 10 per cent. (no charge under $3.00); over $100, 10 per cent. on first $100 and five per cent. on excess up to $500, and three per cent. on excess over $500. Some agencies have a higher tariff.

This to be of course over what can be made out of the other side in the way of costs, if you are so fortunate, for if the collection agency has to sue it has to pay its solicitor's charges, in fact the present mean tariff in the county courts

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* *Vide ante* pp. 145-9, Vol. I., "Precedence at the Bar."

renders business there quite unprofitable unless conducted on this basis, and no client could reasonably object to this well established rule.

It is of course advisable to explain to clients who require what they term a "lawyer's letter" that they will be expected to pay for it even if the result is not satisfactory.

HONOURS, CALLS AND ADMISSIONS.

During Michaelmas Term the following gentlemen, all of this city, were called to the Bar of Manitoba:

Daniel Henry Urquhart, John Hillyard Leech, Frank Mulvey, William Frederick Hull and Charles Henri Royal.

Messrs. Urquhart and Leech, and Ernest Wm. Pearson, of Minnedosa, were also admitted as attorneys, Mr. Urquhart passing both examinations without an oral.

Mr. George William Brown, of Regina, was enrolled as an advocate of the North West Territories on the 20th ultimo.

Messrs. Angus John McColl, of New Westminster, and Lewis Griffith McPhillips, of Vancouver, barristers-at-law, both formerly of this city, were appointed Queen's Counsel on the 4th ultimo.

BRIEFS.

EQUITY SITTINGS on Tuesday, January 17th, 1893.

SIR JOHN THOMPSON succeeds Sir John Abbott as Prime Minister of Canada. This makes the third consecutive lawyer holding the office, and all called "John."

THE ATTORNEY-GENERAL makes the welcome announcement that the government will next year build the court house addition at an estimated expenditure of not more than $80,000.

WE HAVE received a copy of the "Perpetual Ready Reference Guide to The Statutes of Canada" compiled by Mr. F. K. Blatch, of Ottawa, and published by the *Times* office, Brockville. It is a very useful and ingenious publication and got up in an exceptionally neat manner.

WE ARE glad to say that Mr. C. H. Royal assures us that he was not in any way privy to a flamboyant article concerning his call to the Bar, which appeared in the *Free Press* for the 5th instant. Some too zealous friend is responsible for its insertion in our valued contemporary.

ON THE 5th instant the Secretary of the Law Society moved in the Full Court, on behalf of the Society, that Joseph Barr, W. R. Black, J. B. Chambers and Archibald McKay, be struck off the rolls for non.payment of fees. The order was granted and the names have been struck off in pursuance thereof.

[END OF VOLUME III.]

THE WESTERN LAW TIMES REPORTS.

EDITOR:

ARCHER MARTIN,

BARRISTER-AT-LAW.

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THE WESTERN LAW TIMES PUBLISHING COMPANY.

1892.

JUDGES

OF

THE COURT OF QUEEN'S BENCH

FOR

MANITOBA.

DURING THE PERIOD OF THESE REPORTS:

THE HON. THOMAS WARDLAW TAYLOR, *Chief Justice.*

" " JOSEPH DUBUC,
" " ALBERT CLEMENTS KILLAM, } *Puisne Judges.*
" " JOHN FARQUHAR BAIN,

Attorney-General:

THE HON. CLIFFORD SIFTON.

Attorney-General of Canada and Minister of Justice:

THE HON. SIR JOHN S. D. THOMPSON, K.C.M.G.

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THE

WESTERN LAW TIMES REPORTS.

EDITOR:

ARCHER MARTIN,

BARRISTER-AT-LAW.

IN THE SUPREME COURT OF CANADA.

LYNCH v. CANADA NORTH-WEST LAND CO.
MUNIC. OF SOUTH DUFFERIN v. MORDEN.
GIBBINS v. BARBER.

Constitutional law—B. N. A. Act, sec. 91—Interest—Legislative authority over —Municipal Act—Taxation—Additional rate for non-paoment.

JUNE 22, 1891.]

The Municipal Act of Manitoba (1886), sec. 626, as amended by 49 Vic., cap. 52, provides that:

In cities and towns all parties paying taxes to the treasurer or collector before the 1st day of December, and in rural municipalities before the 31st day of December, in the year they are levied shall be entitled to a reduction of 10 per cent on the same, and all taxes remaining due and unpaid on the 1st or 31st day of December (as the case may be) shall be payable at par until the 1st day of March following, at which time a list of all the taxes remaining unpaid and due shall be prepared by the treasurer or collector (as the case may be) and the sum of 10 per cent on the original amount shall be added on all taxes then remaining unpaid.

Held—

Reversing the judgment of the court below, Gwynne J., dissenting, that the addition of 10 per cent on taxes unpaid on March 1st is only an additional rate or tax imposed as a penalty for default and is not "interest" within the meaning of sec. 91 of the B. N. A. Act, and is therefore not within the exclusive legislative authority of the Dominion Parliament.

Appeal allowed with costs.

SOUTH DUFFERIN v. MORDEN.

Joseph Martin, Attorney-General, for applicants.

McTavish, Q.C., for respondent.

LYNCH v. CAN. NORTH-WEST LAND CO.

T. S. Kennedy, Q.C., for appellant.

Robinson, Q.C., and *Tupper,* Q.C., for respondents.

GIBBINS v. BARBER.

G. A. Elliott for appellant.

Tupper, Q.C., for respondent.

RURAL MUNICIPALITY OF CORNWALLIS v. THE CANADIAN PACIFIC RAILWAY CO.

Taxation—Exemption from—Lands sold or occupied—Crown Lands—Locus.

NOVEMBER 16, 1891.]

Vide vol. 1, pp. 134-5, and 48-50.

By the charter of the C. P. Ry. Co. the lands of the company in the North-West Territories, until sold or occupied, are exempt from Dominion, Provincial or Municipal taxation, for twenty years after the grant thereof from the Crown.

Held—

Affirming the judgment of the Court of Queen's Bench,

1. That an agreement to sell any of said lands, which has not been completed by payment of the full purchase

money does not take away the exemption, to effect which all conditions of sale must be fully performed.

2. The exemption attaches to land allotted to the company before, as well as after, the patent is issued by the Crown.

3. Lands situated in the North-West Territories, did not lose the exemption by being afterwards incorporated within the boundaries of the province of Manitoba on the extension thereof.

Appeal dismissed with costs.

Robinson, Q.C., and *Gormully* for the appellants.

Edward Blake, Q.C., and *Tupper*, Q.C., for the respondents.

BERNARDINE v. MUNIC. OF NORTH DUFFERIN.

Contract—Corporation—Capacity to contract except under seal.

NOVEMBER 16, 1891.]

G., in answer to advertisement, tendered for a contract to build a bridge for the municipality of North Dufferin, and his tender was accepted by resolution of the municipal council. No by-law was passed authorizing G. to do the work, but the bridge was built and partly paid for, but a balance remained unpaid, for which B., to whom G. had assigned the contract, (notice of the assignment having been given to the council in writing) brought an action. The only defence urged to the action was that there was no contract under seal, in the absence of which the corporation could not be held liable. On the trial there was produced a document signed by G. purporting to be the contract for the building of the bridge. It had no seal and was not signed by any officer of the municipality. The duplicate was alleged to have been mislaid in the office of the clerk of the municipality.

Held—

Reversing the judgment of the Court of Queen's Bench of Manitoba, 6 M. R. 88, Ritchie, C.J. and Strong, J. dissenting, that the work having been executed and the corporation having accepted it, and enjoyed the benefit of it, they could not now be permitted to raise the defence that there was no liability on them because there was no contract under seal.

Appeal allowed with costs.

Tupper, Q.C., for appellant.

Osler, Q.C., and *Joseph Martin* for respondents.

MUNICIPALITY OF MORRIS v. THE LONDON & CANADIAN LOAN CO.

Appeal—Final judgment—Practice—Specially indorsed writ—Summary judgment on.

NOVEMBER 17, 1891.]

Vide vol. 1, pp. 76-7, and 215-6.

In an action against a municipality to recover the amount of certain debentures the writ of summons was specially indorsed, and defendants having appeared a summons was taken out according to the practice in the Court of Queen's Bench in such cases, calling upon said defendants to show cause at a day named why judgment should not be signed against them summarily. On the return of the the summons the judge before whom it was returnable, after hearing the parties, ordered that plaintiffs should be at liberty to enter judgment in the action for the amount indorsed on the writ. This order was affirmed on appeal to the full court and a further appeal was sought by the defendants to the Supreme Court of Canada.

Held—

That the judgment sought to be appealed from was not a final judgment within the meaning of the Supreme Court act and no appeal therefrom would lie.

Appeal quashed with costs.

Chrysler, Q.C., for motion.

Hogg, Q.C., and *Horace Crawford* contra.

RE LISGAR ELECTION, COLLINS v. ROSS.

Election petition—Preliminary objections—R. S. C. ch. 9, sec. 63—English general rules—Manitoba—Copy of petition—R. S. C. ch. 9, sec. 9 (h)—Description and occupation of petitioner.

NOVEMBER 17, 1891.]

Held—

Affirming the judgment of the court below, that the judges of the court in Manitoba not having made rules for the practice and procedure in controverted elections, the English rules of Michaelmas term 1868 were in force, R. S. C. ch. 9, sec. 63; and that under rule "one" of said English rules, the petitioner, when filing an election petition, is bound to leave a copy with the clerk of the court to be sent to the returning officer, and that his failure to do so is the subject of a substantive preliminary objection and fatal to the petition; Strong and Gwyne, JJ., dissenting.

2. Reversing the judgment of the court below, that the omission to set out in the petitition the residence, address and occupation of the petitioner is a mere objection to the form which can be remedied by amendment, and therefore not fatal.

Appeal dismissed with costs.

Joseph Martin for appellant.

D. McCarthy, Q.C, for respondent.

MANITOBA.

IN THE QUEEN'S BENCH.

COWAN v. DRUMMOND.

DECEMBER 10, 1891.] [IN CHAMBERS—TAYLOR, C.J.

Practice — Contentious affidavit on production of documents—Suppression of documents—Further and better affidavit.

Bill filed by certain members of a syndicate, formed for the purchase of lands, for contribution from the other members.

One of the defendants, A. T. D., filed an affidavit on production of documents in the form in par. 7, sch. 9, to Gen. Orders, denying possession of any document.

Crawford, for plaintiff, moved before the referee for a further and better affidavit, the material for the motion being a clause in A. T. D.'s answer referring to the articles of partnership, and two affidavits verifying certain letters addressed to the plaintiff, some written by A. T. D. and others signed by him with his own or the firm's name, and two statements of account sent plaintiff by his firm.

Bradshaw opposed the motion.

The referee made the order; the defendant appealed.

Held—

That, after a consideration of the cases of *Wheeler* v. *Le Marchant*, 17 Ch. D. 675; *Attorney-General* v. *Emerson*, 10 Q. B. D. 191; *Com. Financ.* v. *Peruv. Guano Co.*, 11 Q. B. D. 55; *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556; *Morris* v. *Edwards*, 23 Q. B. D. 287; 15 App. Cas. 309;

Lyell v. *Kennedy*, 27 Ch. D. 19; and *Noel* v. *Noel*, 1 De J. & S. 472, while no doubt exists that an affidavit contradicting the affidavit on production, a contentious affidavit, cannot be read against it, yet that is not what the plaintiffs were doing in this case.

"They have verified letters written by the defendant himself, and on the foundation of his own statement in these they seek to obtain the further affidavit. I think it would be greatly to hamper the court in ordering full and complete production if such documents could not be made use of, as it is sought to use them here. The letters when looked at raise, not a reasonable suspicion, but lead to the irresistible conclusion that the defendant has, or has had, in his possession documents which he should produce or account for. Then the answer shows that there are articles of partnership in existence. Their existence is shown, and so far the affidavit on production is contradicted by material which clearly falls within that spoken of by Brett, L. J. in *Jones* v. *Monte Video Gas. Co.*, *supra*.

The order made by the referee, however, goes I think, too far in stating what documents the further and better affidavit must specially make reference to. The order should, I think, be amended by striking out the concluding part of the first paragraph, beginning with the words, 'and that said affidavit do specially', down to the end. In other respects the appeal is dismissed without costs."

KAHLER v. FORTIER.

DECEMBER, 11, 1891.] [KILLAM J.

Garnishee order attaching moneys in hands of Government—Requisites of affidavit for—Amendment—Costs of summons where partially successful—Discretion of Referee as to costs—Appeal from on that ground inadmissible.

A garnishee order was made attaching all moneys due from the Province of Manitoba and the city of Winnipeg to the defendants.

Patterson moved absolute a summons to set aside such order on the ground, *inter alia*, that the affidavit on which it was made did not state that the defendants were persons employed or paid by the Province of Manitoba.

Bradshaw, contra, objected that the summons and affidavits did not contain, and should have contained, the name of the city of Winnipeg, one of the garnishees, in the style of cause, and, upon an amendment being allowed by the Referee, consented to an order being made setting aside the garnishing order so far as it related to the Province of Manitoba, but objected to the order being set aside so far as the city of Winnipeg was concerned, and argued that as the defendants had been allowed to amend, and as the summons was too broad and and asked for too much, there should be no costs allowed to the defendants. The Referee held that the order should go setting aside the order so far as the Province of Manitoba was concerned, but that the garnishee order should stand as against the city of Winnipeg, but nevertheless the plaintiffs should pay the costs of the application.

Bradshaw on this day moved for a summons to set aside so much of the Referee's order as directed the plaintiffs to pay the costs of the above application.

Held—

The question of costs being a matter within the discretion of the Referee no appeal should be entertained in such case.

BLAKE v. MANITOBA MILLING, ETC., CO. (LD.)

DECEMBER 14, 1891.] [KILLAM J.

Interpleader—Winding up act—Costs of sheriff—Liability of execution creditor for—Form of order.

Blake, having recovered a judgment against the defendant company, issued a *fi. fa.* under which the sheriff

seized certain goods, which were claimed by the Bank of Brit. N. Am. An interpleader summons was taken out by the sheriff, and pending the disposal of which, and before an issue had been directed, an order was made for winding up the defendants and appointing a liquidator. On the return of the interpleader summons the question arose whether the plaintiff had the right to proceed with the interpleader summons, or whether the liquidator should take steps to contest the claim of the bank, either by being substituted as plaintiff in the proceedings instead of Blake, or by an independent proceeding.

Hough for plaintiff and the liquidator.

Phippen for claimants, the Bank of B. N. A.

Cumberland for sheriff.

A further point arose in that Blake had caused an execution to be placed in the hands of the sheriff of the central district who, having seized, notified Blake's attorneys of an adverse claim and they replied as follows :

. . . As to the rest of the stuff seized we presume your course would be to take out an interpleader summons, of course if there is any dispute you are entitled to protection, and the court affords you this protection without the necessity of either party indemnifying. We think it would be advisable for you to consult your solicitor in the matter.

The sheriff having taken out an interpleader summons, an affidavit was filed by the claimant and the execution creditor then abandoned.

The sheriff sought to charge the execution creditor with the costs of the interpleader.

Munson for sheriff central district.

Hough for Blake, execution creditor.

Judgment—

I can find no authority for assuming to decide between the claims of the liquidator and the bank upon this application, or for substituting the liquidator for the execution creditor. The latter must either take an issue or submit

to be barred and to pay costs of the claimant and the sheriff, in the application by the sheriff of the eastern district. If he submit to be barred, the order will direct that the sheriff withdraw, without determining who may then take possession. In the other interpleader application I think that each party must bear his own costs. The execution creditor never directed seizure of the goods in question. I cannot take the letter of his solicitor upon notice of the claim as one instructing the sheriff to take interpleader proceedings, or as taking a position in opposition to the claim. It merely suggested interpleader as a means of protection of the sheriff who was already liable to an action if the goods ought not to have been seized. I think then that the case does not come within *Searle* v. *Matthews*, W. N. 1883, p. 176; or *Stephens* v. *Rogers*, 6 M. R. 298.

IN RE THE MANITOBA MILLING, ETC. CO. (LD.)

DECEMBER 14, 1891.] [KILLAM, J.

Winding up act—Costs of second petition.

A petition was filed under the winding up act by Blake, execution creditor, and two days afterwards another petition was filed by Henderson, a creditor. The petitions were returnable on the same day, October 19, when an order was made on Blake's petition for the winding up of the company.

Ewart, Q.C., and *Darby* for Henderson claimed to be entitled to costs of their petition.

Hough for Blake *contra.*

Howell, Q.C., for the company.

Phippen for the Bank of B. N. A.

Judgment—

I think that the cases of *In re General Financial Bank*, 20 Ch. D. 276; *Re Norton Tran. Co.*, 47 L. J. Ch. 9; and

In re Building Societies' Trust Limited, 44 Ch. D. 144, established the rule that a party presenting or proceeding with a second petition for winding up a company, after notice of a former one, does so at his own risk as to costs, and can recover costs subsequently incurred only if he can show that the first petition was presented *mala fide* or collusively. I must make the same order as in the latter of these cases, that the second petitioner shall have his share of costs of creditors supporting a winding up order, and the costs of his own petition to, and including, presentation, when he first had notice of the former one.

LOGAN v. CITY OF WINNIPEG.

DECEMBER 14, 1891.] [FULL COURT.—TAYLOR, C., J. DUBUC, J. BAIN, J.

Constitutional law—B. N. A. Act—The Manitoba Act—Separate schools—Right of Church of England thereto—Assessment for school purposes by City of Winnipeg—Quashing by-law of—Public Schools Act 1890 is ultra vires.

1. The members of the Church of England in Manitoba have the same right to separate denominational schools as the Roman Catholics, and it is illegal to assess members of that church for the support of schools which are not under its control.

2. The Public Schools Act, 53 Vic. cap. 38, is *ultra vires*.

3. The applicant did not waive his right to separate schools by taking no steps while previous acts were in force as he was contending for a public and constitutional right.

Vide Barrett v. *City of Winnipeg*, 1 W. L. T. 157, 195, and 2 W. L. T. 119.

The British N. Am. Act, sec. 93, provides:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the union. . . .

The Manitoba Act, sec. 22, provides:

(1) Nothing in any such law shall prejudically affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union.

(2) An appeal shall lie to the Governor-General in Council from any act or decision of the legislature of the Province, or of any provincial autnority, affecting any right or privilege of the Protestant or Roman Oatholic minority of the Queen's subjects in relation to education.

Application by a ratepayer, a member of the Church of England, to quash by-law No. 514, of the city of Winnipeg, for levying and raising the assessment for the year 1891, on the grounds (1) That by the said by-law the amount estimated to be levied for school expenditure is levied upon members of the Church of England and all other religious denominations alike. (2) That it is illegal to assess members of the Church of England for the support of schools which are not under the control of the Church of England and in which there are not taught religious exercises prescribed by said church.

The affidavits filed in support of the application allege that at the time of the union with Canada of what is now the Province of Manitoba, there were in operation a number of parochial schools, in which the distinctive principles and doctrines of the Church of England were taught and which were supported by members of that church, and out of the funds of the church.

Perdue for the applicant Logan.

Howell, Q.C., for the Attorney-General of Manitoba.

Isaac Campbell, Q.C., for the City of Winnipeg.

TAYLOR, C. J.—In the case of *Barrett* v. *Winnipeg*, (1 W. L. T. 157, 195; 2 W. L. T. 119), a Roman Catholic ratepayer sought to quash two by-laws of the city levying by assessment the amount required for the municipal and school purposes of the city for the year 1890. The ground upon which it was sought to quash these by-laws was, that by them the amounts levied for school purposes for the Protestant and Catholic schools were united and one rate levied upon Protestants and Roman Catholics alike for the whole sum. The question involved in that case was whether "The Public Schools" Act of 1890, 53 Vic. 38, under the authority of which the city had acted, was one within the power of the Local Legislature to pass. The argument against its validity was that the Roman Catholics had, at

the time of the union, denominational schools in this province and therefore the Act prejudicially affected a right or privilege which they, as a class of persons, then had by law or practice. The Supreme Court has decided this contention to be well founded; that the Public Schools Act is one which the Legislature of this province had no power to pass; and has ordered the by-laws in question in that case to be quashed. If the facts alleged in the affidavits supporting the present application are correct, and no attempt has been made to contradict them, I do not see how it can be distinguished from *Barrett* v. *Winnipeg*. The Supreme Court there decided a case in which the question was raised, as here, by an individual member of the church. There can be no doubt that under the decision in that case, the members of the Church of England are also a class of persons who had, in the matter of education, a right or privilege by law or practice, at the time of the union. In *Ex parte Renaud*, 1 Pugs. 273, the court in New Brunswick dealt with section 93 of the British North America Act, to which section 22 of the Manitoba Act corresponds. In that case the learned Chief Justice, now Chief Justice of the Supreme Court, held that the words of subsection one were not intended to distinguish between Roman Catholics on the one hand and Protestants on the other. The sub-section means, he said, just what it expresses, that "any", that is every "class of persons", having any right or privilege with respect to denominational schools, whether such class should be one of the numerous denominations of Protestants or Roman Catholics, should be protected. If that is the true reading of sub-section 1 of section 93 of the British North America act, and I do not see how any other reading can be given to it, the same construction must be put upon the corresponding sub-section of the Manitoba act. The words Protestant and Catholic are used in the British North America act as in the Manitoba act. That

being so, there can, I think, be no doubt that under the decision of the Supreme Court in *Barrett* v. *Winnipeg*, the members of the Church of England are a class of persons who had, at the time of the union, a right or privilege by law, or practice, which is prejudicially affected.

I cannot see that the argument can be urged of acquiescence on the part of the applicant. He may not, indeed he did not, move while the previous school acts were in force, but it is a public right he is now contending for, and I do not see that such a constitutional right can be waived. It may slumber, or not be enforced, but it is there all the time. If the members of the Church of England have the right or privilege under the act, it is illegal to assess members of that church for the support of schools which are not under the control of that church, and as the by-law No. 514, now in question, levies one rate upon ratepayers of all denominations, it is illegal and must be quashed.

DUBUC and BAIN, J. J., both concurred, the latter of whom delivered a judgment to that effect.

RUTHERFORD v. DAVISON.

DECEMBER 15, 1891.] [MASTER IN EQUITY.

Taxation of costs—Warrant to tax—Sufficient notice of—Time.

A warrant for taxation of costs for Tuesday, December 15th, at two o'clock, was served on Saturday, December 12th before two. When the taxation came on

Kennedy, Q.C., objected that he was entitled to two clear days' notice, and that the intervening Sunday, the 13th, should not count.

Crawford in reply: 1. There is nothing in the orders or the practice of the court to require the giving of two clear days' notice; a reasonable time is all that is sufficient. 2. Even supposing two clear days' notice were required, this was a two clear days' notice, as it is only in case of the last day falling on Sunday that such Sunday, or any other

holiday would not count as part of the time. 3. The Master having given his warrant, he had no authority to dismiss it.

Held—

The practice requires two clear days' notice, Sunday, or any other holiday intervening, will not be counted in that time. New warrant directed to be served.

REGINA v. CHISHOLM.

JACOB'S CASE.

CROWN CASE RESERVED.

DECEMBER 21, 1891.] [FULL COURT—DUBUC, J. KILLAM, J. BAIN, J.

Criminal law—Indecent assault—Carnal knowledge of girl under fourteen—Form of indictment—Verdict of "guilty."

The prisoner was charged at the autumn assizes, holden at Winnipeg by Taylor, C.J., for that he "in and upon one Maggie Jacobs, a girl under the age of fourteen years . . . feloniously did make an assault, and her, the said M. J. then and there feloniously did unlawfully and carnally know and abuse, etc." The jury found a verdict of 'guilty.' The evidence proved that the girl was thirteen years of age in April 1891, and that there was consent on her part. At the request of the prisoner's counsel the learned Chief Justice reserved the following question for the opinion of the court.

"Was is open for the jury to convict the prisoner by a general verdict of 'guilty' upon an indictment framed as the indictment is in this case where there was consent upon the part of the girl Jacobs?"

The indictment was laid under Can. 53 Vic. c. 37, s. 12, as follows:

"Every one who carnally knows and abuses any girl under the age of fourteen years is guilty of felony, and

liable to imprisonment for life, or for any term not less than five years, and to be whipped."

Hagel, Q.C., and *Cassidy* for the prisoner.

Howell, Q.C., for the Crown.

Held—

That under the authority of *Reg.* v. *Banks*, 8 C. & P. 572; *Reg.* v. *Catherall*, 13 Cox 109; *Nash* v. *Reg.*, 4 B. & S. 935; *Rex* v. *Jones*, 2 B. & Ad. 611; R. S. C. cap. 174, sec. 278 of Procedure Act; and forms in *Archbold's Cr. Pl.*, and *Taschereau's Cr. Law*, that the indictment contained only the one charge of carnally knowing a girl under the age of fourteen years, and that by the general verdict of "guilty" the prisoner was properly convicted of the offence under the indictment; *Reg.* v. *Guthrie*, 11 Cox 552, distinguished.

REGINA v. BRICE.

CROWN CASE RESERVED.

DECEMBER 21, 1891.] [FULL COURT—DUBUC, J. KILLAM, J. BAIN, J.

Criminal law—Indecent assault—Carnal knowledge of girl under fourteen—Form of indictment—Finding of jury.

Prisoner was tried at the autumn assizes holden at Brandon before Honble. Mr. Justice Killam on this indictment:

For that Abraham Depew Brice at etc . . . , on etc . . . , in and upon one R. a girl under the age of fourteen years, to wit., of the age of eight years and eight months, feloniously did make an assault, and her the said R. then and there feloniously did unlawfully and carnally know and abuse, against etc.

Plea: not guilty; verdict, "guilty of indecent assault."

After the verdict prisoner's counsel objected that the indictment charged an assault in addition to carnal knowledge, and not the statutory offence specified in the section

substituted for R. S. C. cap. 162, sec. 39, by 53 Vic. cap. 37, sec. 12,

Every one who carnally knows and abuses any girl under the age of fourteen years, is guilty of felony, and liable to be imprisoned for life, or for any term not less than five years, and to be whipped;

also that under that indictment the prisoner could not be convicted if there were consent; also that the indictment not charging, as was claimed, an offence within the section substituted for said sec. 39, the prisoner could not be convicted under it for indecent assault; and also that the prisoner was not charged with, or tried under an indictment for an indecent assault within the meaning of section 7 of said last mentioned act, and that, therefore, her consent was an absolute bar to a conviction of the offence of committing an indecent assault. The prisoner was sentenced to be imprisoned in the common jail for one year and to receive fifteen lashes, but the execution of the sentence was respited by the learned judge until the following questions reserved for the court were decided:

1. Was it open to the jury, upon the indictment above set forth, to find the prisoner guilty of the offence of committing an indecent assault upon the female therein named?

2. Was the consent of the girl a defence or bar to a verdict upon the said indictment finding the prisoner guilty of committing an indecent assault upon her?

Hagel, Q.C., for the prisoner.

Howell, Q.C., for the Crown.

Held—

That after a consideration of the cases in the preceding case of *Reg.* v. *Chisholm*, *ante* p. 15; *Reg.* v. *Nichol*, Russ. & Ry. 130; *Reg.* v. *Day*, 9 C. & P. 722; *Reg.* v. *Wealand*, 20 Q. B. D. 827; *Reg.* v. *Paul*, 25 Q. B. D. 202; *Reg.* v. *Ryland*, 11 Cox 101; *Reg.* v. *Martin*, 2 Moo. C. C. 123; and *Reg.* v. *Read*, 1 Den. 377, the first of the questions submitted for the opinion of the court should be answered

in the affirmative, and the second in the negative, and the conviction affirmed.

LONDON & CAN. L. CO. v. STEWART, AND J. R. STEWART, JR., CLAIMANT.

Interpleader—Second seizure by sheriff—Costs of.

JANUARY 11, 1892.] [THE REFEREE.

Application for interpleader by sheriff of Western Judicial District.

The sheriff went to the judgment debtor's farm under a *fi. fa.* and made a seizure of certain chattels and, a claim having been made thereto, applied for and obtained an interpleader summons. It appeared from the affidavits filed that in order to serve the summons on the claimant the sheriff had occasion to go to the farm of the judgment debtor and while there he, as the result of an interview he had with the judgment debtor, seized a flock of sheep which were then there, but had not been there on the occasion of the former seizure. The judgment debtor informed the sheriff that the reason that the sheep were not on the farm when the other goods were seized was because they had been astray in a storm before that time, and had been lost for three days. Sheriff had been informed by letter two weeks before first seizure that there were sheep to be seized and specially requested to seize them, and on first trip the bailiff only looked over the premises of defendant for the sheep. A claim likewise having been made to these sheep,

O. H. Clarke for the sheriff obtained an interpleader summons.

Cumberland for the claimant.

Patterson for the execution creditor objected that the sheriff was not entitled to the costs of the second applica-

tion because he should have seized all the goods at the time of the first seizure.

Clarke, in reply, contended that under the circumstances this was an impossibility, and that the sheriff, having acted throughout in a proper manner and in perfect good faith, was entitled to costs.

Held—

That the sheriff was not entitled to the costs of the second application.

HADDOCK v. RUSSELL.

JANUARY 12, 1892.] [KILLAM, J.

Appeal from County Court judge—Application to Q. B. for leave—Discretion as to—Improper for county court judge to set aside verdict of jury—New trial in such cases.

Vide prior report of this case vol. 2, p. 108.

Application by defendant to the Queen's Bench for leave to appeal under sec. 244 of county court act from verdict entered in county court of Selkirk by county judge.

Andrews for plaintiff.

Haggart for defendant.

The facts appear from the

Judgment—

This is an ection of replevin in a county court to recover a sewing machine claimed of the defendants, mother and daughter.

The plaintiff identified the machine and gave evidence that he had "sold" it to the daughter under an agreement in writing produced. The agreement was what is known as a hire receipt, by which defendant, the daughter, ackowledged to have "hired" of the plaintiff a certain sewing machine distinguished by its number and make, and agreed to pay therefor $5 per month until $75.00 should have been paid, and on default the plaintiff was to be at liberty

to retake the machine, and until full payment of the $75.00 no title was to pass. The plaintiff also gave evidence that he had been paid $5 and no more and had demanded the machine. Several instalments had matured when the action was brought. The plaintiff also stated that the defendants resided together and that the mother, when he demanded the machine, claimed to have seized it on some old claim against him.

Both defendants appeared as witnesses and neither of them disputed any of these statements of the plaintiff, although none were expressly admitted. The only defence set up was that of a set-off for the mother's claim, which was stated to have been assigned to the daughter. The action was tried by a jury which found a verdict for the defendants. This verdict was set aside by the learned judge of the County Court and judgment ordered to be entered for the plaintiff. Thereupon the defendants appealed to the Court of Queen's Bench and their appeal was struck out on the ground that they could not appeal without special leave. They then applied to the judge of the county court for leave to appeal under the 244th section of the County Courts Act, 1887, and the leave was refused. They then obtained a summons from a judge of the Court of Queen's Bench to show cause why they should not be allowed to appeal, claiming principally that the learned judge of the County Court exceeded his powers in directing the entry of judgment instead of granting a new trial.

Upon this point I agree entirely with the defendants contention. It is within the province of a jury to disbelieve the evidence of one party or the other and to give a verdict for the party who upon the face of the evidence should not succeed ; and if the jury exercise its power in this respect unreasonably, the only remedy is the granting of a new trial. A party is not entitled to succeed, where the trial is by jury, unless there is verdict of a jury in his

favour. Here, however, the defendants are not entitled as of right to appeal. They must procure leave. Am I bound to grant that leave simply because I deem the judgment sought to be appealed against technically erroneous? The learned judge of the County Court clearly shows his opinion that there was no reason to doubt the plaintiff's right to recover. The defendants were defended by counsel. It is not reasonable to suppose that, if there were any ground for disputiug the plaintiff's statements identifying the machine, and the contract and of default in payment, evidence in contradiction of them would not have been given. There is nothing before me to suggest that this could be done. The alleged set-off could not possibly constitute any defence. It is shown that the defendants have not paid the costs of the appeal which was struck out, and the circumstances of the case leave no doubt that they have little means.

Under the circumstances, I think that it would not be in the interests of justice to give them an opportunity of pursuing this litigation longer and of putting themselves and the plaintiff to further expense.

I shall therefore refuse the application, but as I do so merely in the exercise of discretion, when I think that the defendants are technically in the right, I allow no costs.

LOGAN v. CITY OF WINNIPEG.

JANUARY 13, 1892.] [BAIN J.

Appeal direct to Privy Council from Queen's Bench of Manitoba—Security in such case.

Howell, Q. C., presented a petition on behalf of the defendants in this matter setting forth that the court in giving judgment (*ante* p. 11) against the city had followed the decision of the Supreme Court of Canada in *Barrett* v. *City of Winnipeg*, 2 W. L. T. 119, which case was now being brought by the defendants before the Judicial Com-

mittee of the Privy Council by way of appeal from the Supreme Court; that the questions in dispute were similar in each case, save that the right to separate schools is by the finding of the court in this case extended to the members of the Church of England in Manitoba as well as Roman Catholics; that it would be a useless expense to have this case heard by the Supreme Court as the petitioners intended in case of an adverse decision by that tribunal to proceed to the Judicial Committee; and praying that leave should be granted by this court to the petitioners to carry the case direct to the last named tribunal, on any reasonable terms.

Perdue, for the plaintiff, offered no objection to the petition but requested that security for costs be given in a proper amount.

Held—

That the prayer of the petitioners should be granted, and that upon paying into court the sum of $2000 as security that the appellants will effectually prosecute this appeal, the petitioners be at liberty to appeal from the said judgment to Her Majesty the Queen in Council.

Though there is nothing in our statutes to serve as a guide as to what are "reasonable terms" yet the provision in the Ontario Act regulating security in appeal to the Privy Council might be accepted as an analogous precedent.

RUDDELL. v. GEORGESON.

JANUARY 27, 1892.] [TAYLOR, C. J.

Real Property Act—Issue—Plaintiff in when caveator claims under tax deed—Patentee from Crown.

Plaintiff purchased certain lands at a tax sale in 1887 and received his tax deed two years thereafter. In 1882 one Peel had entered into an agreement for sale to purchase these lands from the Government, but only paid part of the purchase money. Defendant purchased the

lands from Peel in 1891, paid the balance due to the Government and obtained his patent therefor. He then applied for a certificate of title, and plaintiff thereupon lodged a caveat alleging that Georgeson was a trustee for Peel and that there had been no *bona fide* sale, and that Georgeson should be declared a trustee for him. On the hearing of the petition he claimed that he should be made the plaintiff in the issue then directed, as under 54 V., c. 5, s. 9, his tax deed was *prima facie* evidence of title.

Howell, Q.C., for the caveator.

Tupper, Q.C., and *Phippen*, for the caveatee.

Judgment—

Both parties concede that it is a matter in which for the purpose of justice a bill should be filed. The only question raised was as to who should be plaintiff and file the bill. As a general rule the caveator is to be the plaintiff, but upon proper cause the court may direct the caveatee to be plaintiff. In the present case the caveator should be plaintiff. I do not see what bill the caveatee could possibly file. The caveator can file a bill to have the caveatee declared a trustee for him. That is the case he makes by his petition and it must be assumed to be the case on which he relies.

WILLIAMS v. MAGEE.

JANUARY 28, 1892.] [TAYLOR, C. J.

Appeal in demurrer to Full Court—Deposit must be made in case of.

A defendant having demurred to a bill, and the demurrer being overruled, set the same down for argument in Term, but did not pay into court the usual deposit. The Refereee, on motion of the plaintiff, made an order limiting the time for paying in the deposit, and in default for striking the case off the cause list. Against this order the defendant appealed.

O'Reilly for the defendant. No deposit is necessary. The argument of the demurrer is not a hearing and, by the English practice in force in this province, it is only on the rehearing of a decree made at the original hearing of a cause, or upon further consideration that a deposit is required. Here one defendant has demurred, another has answered, and no replication has been filed, so the cause is not at issue. There can be no hearing of a cause until it is at issue, and unless there has been a hearing, there can be no rehearing, *Daniels Ch. Pr.*, 1350; *Morgan & Chute*, 523; G. O. 99, 138, 139, 168.

Hough for plaintiff was not called upon.

Held—

That while it is stated in *Daniels' Practice* at the above reference that "a deposit is only required where the appeal is from a decree or order made on the original hearing of a cause or on further consideration" yet an investigation of the authorities cited in support of that proposition goes to show, that under the English practice wherever a petition of rehearing was the proper mode of proceeding to review a decree or order, three things were necessary, viz.: a certificate of counsel, a fiat of the Lord Chancellor to set down, and a deposit; and under our practice, the petition—and consequently the certificate of counsel—not being required, the only requisite which remains is the deposit here necessary under G. O. 317, so, therefore, whenever in England in 1870 the practice required a petition of rehearing to be presented for the purpose of having a decree or order reviewed, it is necessary here, before setting down a similar decree or order to be reheard before the Full Court, to pay in a deposit of $40.

Appeal dismissed, costs to plaintiff in any event.

CASE MACHINE CO. v. LAIRD.

FEBRUARY 1, 1892.] [FULL COURT—TAYLOR, C. J. DUBUC, J. KILLAM, J.

Demurrer—Agreement under seal—Distinct collateral parol agreement —Counterclaim for damage for breach of.

Appeal by plaintiffs' from judgment of Mr. Justice Bain, vol. 2, p. 83, allowing a demurrer to plaintiffs' replication.

Declaration:

1. Promissory note, $200, due Jan. 1, 1891.

2. Agreement under seal for purchase by defendant from plaintiff of separator, to be paid for at delivery, or cash $300 and three notes, two for $200 and one for $215; alleging delivery and payment of said cash and failure to make and deliver notes, and claiming payment of $200 on note due in January as above; yet default, etc.

4. Alleges order for separator: payment of $300; giving of three notes; that by default in payment of note due Jan. 1891, the $300 cash became rent only, and the whole of the purchase money, $915 and interest, became due; yet non-payment.

5. Alleges order; payment $300; three notes; by default in payment of $200 note the whole of purchase money, $615 with interest, and the three notes became due; yet non-payment.

Pleas:

5. To the first count—

In consideration that defendant would enter into agreement in second count and make cash payment and give notes, plaintiff agreed to accept a second-hand separator for $200 and give credit therefor upon first note; and alleges signing of agreement, giving of notes, delivery of second-hand separator and receipt and acceptance thereof and payment before note due of $5.05, which sum, together

with the second-hand machine, satisfied and discharged, etc.

14. Same defence to 2nd, 4th and 5th counts.

Counterclaim: Damages $1000 for breach of agreement that if defendant would execute deed, etc., and give second-hand machine plaintiff would apply purchase money of such machine on new machine, and damages also for consequent liability on notes for new machine.

Replication: This agreement not made by deed.

Demurrer by defendant.

Mulock, Q.C., for plaintiff.

Howell, Q.C., for defendant.

Held—

The agreement set up in the fifth and fourteenth pleas is not inconsistent with, nor does it in any way contradict or vary the agreement set out in the declaration and relied on by the plaintiffs; it is really an independent collateral agreement and the pleas are, or amount to, pleas of accord and satisfaction.

2. The agreement set up in the counterclaim is an independent collateral agreement, for breach of which damages can be claimed. The agreement under seal is not in any way varied by this agreement, nor is it put forward as a variation of the first agreement.

Judgment affirmed, appeal dismissed with costs.

MACHRAY v. HIGGINS.

FEBRUARY 1, 1892.] [FULL COURT—TAYLOR, C. J. DUBUC, J. KILLAM, J.

Will—Construction of—Widow's annuity payable out of income or corpus—Advances for maintenance and education—Power to mortgage estate.

Vide vol. 2, pp. 105-6, 95-7.

Bill filed by trustees and executors of John Higgins, deceased, for the interpretation and construction of his will.

Appeal by the widow from the judgment of Bain, J., October 23, 1891, *supra.*

The testator directed that the trustees of his will should convert all his real and personal estate into money, and after payment of his debts, etc., invest the proceeds on the following trusts:

Out of the income thereof to pay to my said wife during her life if she shall remain my widow, an annuity of $2,000 by equal quarterly payments, the first of such payments to be made at the end of three calendar months after my decease, and in trust as to the residue of the said income to apply the same, or such portion thereof . . . . in or towards the support, maintenance and education of my present and future born children until the eldest surviving of them shall attain the age of twenty-one years, and in trust, if my said wife be then living and shall have continued unmarried, then to set apart such portion of the residuary trust funds as in the opinion of my said trustees shall be sufficient to realize the said annuity given to my said wife, etc.

The testator died in 1884, leaving his estate heavily encumbered; the trustees have sold and converted into money portions of the real estate, but a large part, upon which there are heavy mortgages, remains still unconverted, because it could only be sold at a ruinous sacrifice. The income of the estate has not been sufficient to pay the annuity of $2,000 per annum to the widow, who has remained unmarried, and the trustees have been compelled to advance a portion of the capital of the estate for the maintenance and education of the children, and have paid the same to the widow for that purpose.

Wade, for the widow, argued that she was entitled to her annuity without abatement, and that if the income of the estate were not sufficient to pay the annuity, it should be paid out of the capital, and that when the eldest surviving child attains the age of twenty-one years she is then, in any event, entitled to her annuity of $2,000 a year out of the estate so long as she remains unmarried; she should also be repaid, by the trustees, moneys which she alleges she has expended in the partial support and education of the

children over and above what she has received from the estate for that purpose.

Perdue for the plaintiffs.

Cameron for the infants.

Held—

1. The fact that the income had proved insufficient would not justify the court in making a will for the testator. The annuity could be paid only out of the income, and neither before or after the attainment of twenty-one could the *corpus* of the estate be drawn upon to make up any deficiency of income; a deficiency of one year could not be made up from the surplus of another, the intention being to charge each year's income with the payment of the annuity.

2. No payment could be made by the trustees to the widow on account of past maintenance.

3. The trustees had no power to mortgage the estate.

Decree affirmed, appeal dismissed with costs.

TAIT v. BURNS.

FEBRUARY 1, 1892.] [TAYLOR, C. J.

Practice — County Court costs—Reviewing taxation of—Jurisdiction—Witness fees — Counsel fee to unlawful practitioner — Effect of transcript.

In February, 1891, a replevin suit was tried in the County Court of LaVerandrye which resulted in favour of the defendant, the costs being taxed *ex parte* and the judgment signed in March. On the 13th August following a transcript of the judgment was obtained and filed in the County Court of Selkirk under the provisions of 50 V., c. 9 s. 124, as amended by 54 V., c. 2, s. 13. On 14th August an order was obtained in the latter court, garnishing money of the plaintiff, which having been paid into court by the garnishee, was paid out to the defendant on 4th September. On that day a second garnishing order

was issued from the same court under which also money was paid in, and this was on the 25th September, paid out to the defendant under a summons served personally upon the plaintiff. On the 27th October the plaintiff obtained from His Honor Judge Prud'homme, the Judge of the County Court of LaVerandrye, a summons for revision of the taxation of costs. On the 6th November that summons was disposed of, one item objected to being reduced from $12.00 to $10.00. The other items objected to were allowed to stand as taxed by the clerk, and the defendant being allowed $2.00 costs on the revision the amount due from the plaintiff stood practically as it did before the revision.

From the order made on the 6th November the plaintiff appealed under 50 V., c. 9, s. 243, as amended by 54 V., c. 2, s. 21.

The items objected to were, first, an allowance made to a veterinary surgeon for his time and expenses, and to the defendant for his expenses accompanying him to examine the animal, the subject matter of the suit; second, two items of witness fees which had not been paid the witnesses at the time of the taxation, or so far as appears up to the present time; and third, a sum of $8.00 allowed as a counsel fee, the objection being that the person to whom it had been allowed was not, as required by 50 V., c. 9, s. 85, sub.-sec. 2, a duly qualified attorney or barrister.

In the course of the argument: *Severn* v. *Olive*, 3 B. & B. 72; *May* v. *Selby*, 1 Dow., N. S. 702; *Laing* v. *Bowes*, 2 M. & S. 89; *Gravatt* v. *Atwood*, 21 L. J. Q. B. 215; *Trent* v. *Harrison*, 2 D. & L. 941; *McGannon* v. *Clarke*, 9 P. R. 555; *Hornick* v. *Romney*, 11 Can. L. T. 329; *Smith* v. *Day*, 16 Ch. D. 726; *Bouchier* v. *Patton*, 3 C. L. J. O. S. 108; *O'Brien's Div. Courts Act*, 159, were cited and remarked on.

Baker for plaintiff.

Mathers for defendant.

Judgment—

On the opening of the appeal the objection was taken that this is not an appealable matter. I find however that in England under the new County Court Act, Imp. Act, 51 & 52 V., c. 43, the wording of which is not wider than our own act, there may be an appeal on a question of costs. In *Nichol & Haywood's County Court Practice* 387, after discussing the question of appeals from interlocutory orders, it is said : "Even if such be the result of the act it does not follow that an appeal will always lie against the judge's decision to review a taxation of costs ; so far as it is a matter of discretion, it is a matter purely for the judge ; but should his decision be affected by error of law or the misapplication of a legal principle, then an appeal may lie." . . . . In *Goodman* v. *Blake*, 19, Q. B. D. 77, the court held there was a right of appeal "as the order appealed against involved a question of legal principle."

The objection that the revision was not applied for within a reasonable time is not one open to the defendant now. That was a matter for the County Court Judge, and if he chose to grant a commission his discretion in doing so should not to be interfered with.

There was a further objection that a transcript having been filed in the County Court of Selkirk before the revision took place, no further proceedings could be taken in the County Court of LaVerandrye. The transcript was I suppose filed in the County Court of Selkirk for the purpose of proceeding under section 194 of the County Court Act. It does seem strange if a judgment can be a judgment in two Courts at the same time, and in *O'Brien's Div. Court Act*, p. 159, where the question of a transcript from a Division Court in Ontario to a County Court is dealt with, it is said that in such a case the judgment ceases to be a judgment of the Division Court because it

cannot be a judgment of two Courts at the same time. Yet from 50 V., c. 9, s. 123, amended by 54 V., c. 2, s. 13, it seems to remain a judgment of the original Court, for the judge of that Court can deal with it even to setting it aside, and that even after, by the filing of a transcript, it has become a judgment of the Court of Queen's Bench.

Dealing with the items objected to, I think there was no power to make the allowance to the veterinary surgeon, and to the defendant in accompanying him, who went to examine the animal in question; that would be costs of producing evidence and taxable, it may be in a Court of Equity, under the practice of that Court, but not in a common law action until 1875, when a rule under the English Judicature act was made on the subject. The allowance for witnesses in the County Court of this Province is regulated by schedule C to the County Courts Act, 1887, the first part of which is headed "allowance to witnesses." An addendum to that schedule says: "In all the above cases the costs must be strictly taxed according to the very letter and spirit of this tariff." There is nothing in that schedule to warrant such an allowance as has been made here.

The item of $8.00, counsel fee, was also improperly allowed. The objection was taken before the judge that the person to whom it was being allowed was not a duly qualified attorney or barrister as required by the statutes. No evidence was adduced of his being so, and I think when this objection was taken that the person claiming the fee was not duly qualified, the onus was at once upon him to prove his title to the fee.

The judge refused to entertain the objection because he said it formed part of his decision, and could not be varied after the expiration of six months. But the statute speaks of this part of the costs, because the first sub-section of sec. 85 says, the Judge may allow a sum to be taxed in addition

to the witness fees and disbursements, and the second sub-section says, "no costs shall be taxed under this section," etc. Now the judge had issued, and was then acting under a summons to review the taxation of costs, and this question whether the fee should be allowed or not was clearly before him.

As to the two items of witness fees objected to, the judge had clearly a discretion. The objection is that these had not been paid at the time of taxation. Numerous cases were cited to show that they must be so, or they cannot be taxed. Nothing can be better settled, whether they can be taxed if paid after the taxation is acted upon, does not seem clear.

. . . . Under the County Court Act 1887, by the addendum to schedule C, it is said "before taxation of witness fees the fees must be actually paid unless the Judge otherwise orders." When the clerk taxed these fees no order had been made, so his doing so was improper. But the statute does not say when the order is to be made. It is not as in the case of a certificate for costs under 48 Vic., c. 17, s. 133, where the statute fixes the time at which it must be given. The judge is not under the County Court Act limited to any time. Besides under the summons for revision, the question was before the judge, whether these witness fees should or should not be taxed and allowed, and his right to make the order then was undoubted, whether they should be allowed or not, though unpaid, was entirely at his discretion, and it cannot be interfered with.

The result is that, as to the items of $18.80, reduced by the judge to $16.90, and that of $8.00, the appeal is allowed.

As to the other items it is dismissed.

The appeal partly succeeds and partly fails, so there will be no costs.

THE

WESTERN LAW TIMES REPORTS.

EDITOR:
ARCHER MARTIN,
BARRISTER-AT-LAW.

MANITOBA.

IN THE QUEEN'S BENCH.

REGINA v. LACOURSIÉRE.

FEBRUARY 11, 1892.] [DUBUC, J.

Ceritorari—Criminal law—Conviction of J. P.—Reviewal of evidence by Queen's Bench—Jurisdiction of J. P.'s in cases of receiving stolen goods where title to the property is set up—Agreement between prisoner and prosecutor void.

Application for certiorari. The accused was convicted before A. G. Hepworth, Walter Dickson and J. M. J. Mulvihill, three justices of the peace at St. Laurent, for receiving stolen goods, viz: one bedstead, knowing the same to have been stolen. The prisoner at the trial claimed to be the owner of the property, but was found guilty by the justices, and on the consideration that he would not be sent to jail, agreed to return the bedstead within 48 hours, to pay all costs of the court, and to pay $50 damages,

and not to appeal against the conviction. He returned the bedstead, which was of the value of $1.25 cents, within the specified time.

The following is a copy of the alleged "agreement":

Memo:

Conviction made.

Defendant to be discharged from conviction on restitution of the bedstead in 48 hours and on payment of costs of Court, and $50 damages to Count de Leusse within fifteen days.

No appeal in (or) proceedings to be taken against this conviction.

A. D. L.

A. G. Hepworth, J. P.
J. M. J. Mulvihill, *ex officio* J. P.
Walter Dickson, J. P.

The prosecuting counsel, the prosecutor, and one of the justices filed affidavits to the effect that the prisoner agreed to the terms of the above conviction, and that the clerk acting for the prisoner initialed the writing "A. D. L." to signify his approval of it.

The prisoner and the clerk swore that they did not so agree, and that the initialing was a mere formal part of the proceedings, and the clerk assumed that it was usual to do so.

Mulock, Q. C., appeared for the prosecutor at the trial

Delaronde, a clerk (not articled) of Messrs. *Prendergast & Huggard* appeared for the prisoner.

The learned judge gathered from the verified copy of the depositions taken before the justices that there had been no criminal offence committed, and that one of the essential ingredients of the offence charged, *i. e.*, the felonious intent, was absolutely wanting, as appeared not only by the affidavits filed on behalf of the prisoner, but by the evidence of the prosecutor, the Count de Leusse, successor of the Duke de Blacas, given at the trial, and there was not even the appearance of felonious intent.

Huggard for the rule.

Mulock, Q. C., for the prosecutor and two of the justices.

Held—

1. Though on applications of this kind the court will not look at the depositions for the purpose of reviewing the decision of the magistrates as to the weight of evidence, yet it may do so to ascertain whether there was a criminal offence committed, so as to give them jurisdiction.

2. The dictum in *Short & Mellor's Crown Practice*, 120, that the "jurisdiction of justices is ousted, as a general rule, by the defendant setting up a *bona fide* claim of title in himself, even if only a colourable one, provided it is one known to the law," followed; *vide* also, *Reg.* v. *Cridland*, 7 E. & B. 853 and 867; *Cornwell* v. *Sanders*, 3 B. & S. 212; *Reg.* v. *Stimson*, 4 B. & S. 301; and *Re Bailey*, 3 E. & B. 606.

3. The agreement or promise made by the prisoner, or with his consent by the clerk who acted for him, could not be held to be binding on him even after part performance as stated. There was no valid consideration for such an agreement and it was illegal and void, and the action of the justices was an abuse of the process provided by the criminal law. *Bracewell* v. *Williams*, L. R. 2. C. P. 196; *Williams* v. *Bayley*, L. R. 1 H. L. 200; and *Doyle* v. *Carroll*, 28 U. C. C. P. 218.

4. The fact that, in applying for the rule nisi for certiorari the accused failed to disclose that he had entered into the above agreement after being found guilty and had returned the bedstead, did not debar him in the premises, as the whole circumstances of the case revealed ample ground for granting the said rule.

5. "Considering that the article alleged to have been stolen was proven to be worth about $1.25 at the utmost, and that the accused never concealed anything about it, and when asked about it admitted having taken it, and made at once a *bona fide* claim to the article as the owner thereof, it seems to me that the whole proceedings, arrest,

trial, and conviction, were a gross abuse of the criminal process of the court for the purpose of obtaining an undue advantage in a most trivial matter, which would have been so considered even if the dispute had been litigated in a court of civil jurisdiction."

Rule for certiorari directed.

MARTIN v. THE *FREE PRESS.*

FEBRUARY 13, 1892.] [FULL COURT—TAYLOR, C.J. DUBUC, C. BAIN, J.

Libel—Fair comment—Justification—Verdict rendered under misapprehension.

The plaintiff, the then Attorney General of Manitoba, brought an action against the defendants, an incorporated company, for printing and publishing the following alleged libel:

Another disgraceful piece of business, which has never yet been explained, was the celebrated $500 a mile charge, which, had it not been for the watchfulness of the *Free Press*, would have put $90,000 into the promoters' pockets, and everybody knows the Attorney-General was the principal promoter.

Inuendo:

Meaning thereby that the plaintiff as a member of the Executive Committee of the Province of Manitoba, took part in the negotiation of a contract between her Majesty the Queen and certain persons who afterwards became incorporated as The Northern Pacific & Manitoba Railway Company, and at the instance and by the connivance of the plaintiff, provision was made in the contract arising from such negotiations whereby a large sum of money should be raised by the said company, a portion of which was to be dishonestly and corruptly received by the plaintiff for his own use and benefit, to the great detriment of this Province.

Pleas: 1.—Not guilty; 2.—

That before and at the time of the alleged publication of the alleged libel, great public interest was felt in the Province of Manitoba in reference to the negotiation and making of the contract in the declaration referred to and the subject was much discussed in the said Province, both in the public newspapers and otherwise, and the words complained of were and are part of an editorial article referring to the said matter, and

the defendants being the proprietors of a public newspaper published the words complained of together with the whole of said editorial article, which is the publication complained of, and the words complained of were fair comment on the said matters of great public interest in the said Province and were published by the defendants *bona fide* for the benefit of the public, and without any malice towards the plaintiff.

Plaintiff joined issue; verdict found for defendants by a special jury.

Howell, Q.C., and *C. P. Wilson*, moved for new trial, on the ground that verdict was against weight of evidence; for mis-direction and non-direction; for improper reception and rejection of evidence; and because the jury did not understand the judge's charge.

Hagel, Q.C., *contra.*

Held—

1. That where a defence of fair comment is set up, what is commented on must be facts admitted or proved to be true; publication of defamatory matter in the belief that it is true, is no justification; an alleged libel which contains imputations on private character, exceeds the limits of fair criticism, *Campbell* v. *Spottiswoode*, 9 B. & S. 769; and *Davis* v. *Shepstone*, 11 App. Cas. 187.

2. Where there is a plea of justification on the record, the plaintiff may, if he chooses, in the first instance meet the justification, or leave such proof until the reply, but cannot divide his proof by calling evidence to meet the justification in the first instance, and more in reply, *Brown* v. *Murray*, R. & M., 254, and there is no difference where the plea is fair comment.

Quaere, whether under such a plea as the above, the defendant is entitled to prove that a direct charge, such as the above, is true?

3. Where it is clear, as in the present case, from the verdict of the jury that they did not understand the judge's charge, or disregarded it and did not consider the question it was essential for them to consider and pass judgment

upon, a new trial should be directed; costs to be costs to the successful party; DUBUC, J., dissenting.

THOMPSON v. SEGUIN.

FEBRUARY 13, 1892.] [FULL COURT—DUBUC, J. KILLAM, J. BAIN, J.

Commission—Suppression of—Waiver of irregularities in—Watts v. *Anderson, 5 M. R. 291, distinguished.*

Appeal from order of the Chief Justice reversing an order of the Referee, which was made dismissing an application to suppress a commission and the evidence taken under it.

The commission was sought to be suppressed on the following grounds: 1. That this is an interpleader issue in which, as it is claimed, no commission can be taken or issued; 2. That the order for the commission was silent as to the mode of examination, while the commission itself directed an examination upon *viva voce* questions, and the examination was held as directed by the commission; 3. That there were some slight variations from the issue in the names of the parties as given in the order and the commission.

Culver, Q. C., and *Elliott* for the appellants.

C. P. Wilson for the defendants.

Judgment—

KILLAM, J.—The first point does not appear to me to be one which should be raised upon an application of this kind. If it be correctly taken, the whole of the proceedings in respect of and under the commission were complete nullities, and the evidence cannot be used. The statute, 49 Vic. c. 35, s. 19, saves any objection to the admissibility of the evidence and if there is no jurisdiction to direct the issue of a commission in interpleader, its issue and

execution cannot make evidence taken by that method admissible. The statute was, as appears to me, aimed only at defects in the commission or its execution, not at proceedings wholly null and void. The latter cannot require any order of suppression. There is nothing to suppress. As appears by the evidence, the defendant's attorney deliberately refrained from opposing the order directing the commission. Evidently he did so for a purpose. He wished to speculate upon the result, and be in a position to allow the use of the evidence, or not, according as it should prove favourable to the defendants, or the reverse. He wished also to endeavour to obtain some discovery from the witness, who was the judgment debtor.

It appears to me, however, that the statute could never have intended that such a course should be taken. The time to object to the issuing of the commission is when the order is applied for. So far as proceedings in Chambers are concerned, that should be the only time. A party cannot move either the Referee or another Judge to discharge a Judge's order for a commission. It is unreasonable to suppose that it was intended that he should do so indirectly, by a motion to suppress what, if the order were without jurisdiction, was itself by the same reasoning a wholly void proceeding. Here we see that the Referee was asked to set aside an order of a Judge. I think that he was right in refusing to do so either directly or indirectly. The objection should be left to be dealt with at the trial, when any decision can be the subject of appeal to the highest Court of Appeal. The statute did not intend, I think, to give a choice between a motion to suppress and an objection to the evidence, but each method is intended to be exclusive so far as applicable. This objection ought, in my opinion, to be considered wholly as an objection to the receipt of such evidence, and one that can be raised only at the trial.

The objection to which the learned Chief Justice gave effect was the second, following *Mulligan* v. *White*, 5 M. R. 40, and *Watts* v. *Anderson*, 5 M. R. 291. The Referee, on the other hand, found that the conduct of the defendant's attorney constituted a waiver of the objection.

I find it very difficult to believe that the defendant's attorney did not fully understand that it was an examination wholly *viva voce* that was contemplated and intended on the part of the plaintiffs; but still I can find no consent to such a method of examination and nothing in the conduct of the defendant's attorney before the attorneys met at St. Paul for the purposes of the examination, which could waive the objection. That the commission was wrong in form must be taken as settled by *Watts* v. *Anderson*. But, on the other hand, the judgments in that case appear to admit that the defect is one which may be waived. I am still of the opinion which I formed upon the original motion in that case, that such a defect is a mere irregularity in the form of the commission, which may be waived by any participation in the proceedings under it, although I did not there rely on the act of the foreign agent, but on the conduct of the attorneys, as constituting such waiver.

It appears to me that in the case now before us the conduct of the defendant's attorney at St. Paul constituted a waiver of the irregularity. He entered into an agreement waiving notices of proceedings under the commission. It is true that this was with a proviso that in other respects matters were to be as if the notices were duly given, but it is the fact of entering into any arrangement respecting the proceedings under the irregular commission that constituted the waiver. Then the defendant's attorney attended before the commissioner, when the latter took the oath of office, and when he administered the oath to the witness; and it was only when a question was put that he raised an

objection, and that not to the taking of any proceeding under the commission, but to the method of procedure; and afterward he did what evidently he desired from the beginning—he proceeded to cross-examine the witness at great length respecting his dealings before judgment. It is true that there was an agreement that his objection should apply to the whole examination under the commission; but the mode of examination was that directed by the commission, and that which, so long as the commission stood, the commissioner was bound to follow. There was no agreement that counsel should be at liberty to cross-examine under it, without waiver of the irregularity in it. In fact, the moment we recognize the point that the defect was in the form of the writ itself, it at once becomes apparent that participation in any proceeding under it has the effect of waiving the irregularity unless there is a clear agreement to the contrary.

That the circumstances to which I have referred may waive objections to the commission or irregular proceedings under it appears clear from the judgments in *White* v. *Hallett*, 28 L. J. Ex. 208; *Gray* v. *The General Iron Screw Colliery Co.*, L. R. 1 C. P. 600, and *Hawkins* v. *Baldwin*, 16 Q. B. 375.

The decisions cited for the defendants do not appear to me to be in any way opposed to the views which I have expressed.

In *Watts* v. *Anderson*, it was merely held that the foreign agent did not waive the objection by taking part in the proceedings under the commission; but in the present case it was one of the attorneys for the defendant who acted. He states that he knew of the decisions in this court, and of his authority to waive the objection there can be no doubt.

In *Wilson* v. *Wilson*, 49 L. T. N. S., 430, the commissioner was not named in the commission, but it was to be

executed by a party to be appointed by a certain court, and the objection was that the party who had acted had not been appointed by the proper authority. Certainly attendance upon the examination and cross-examination of the witness could not give the authority if the party was not duly appointed.

The *Melville Mutual Marine and Fire Ins. Co.* v. *Driscoll*, 11 S. C. R. 183, came before the Supreme Court of Canada on appeal from the Supreme Court of New Brunswick. The examination was conducted by the commissioners, one of whom was named by each party. The commissioner named by the defendant cross-examined the witness but refused to certify to the return, which was made by one commissioner only. Some of the interrogatories and cross-interrogatories were not administered, and those apparently very important ones. It was held that the commissioners were not agents of the parties but officers of the court, whose action did not bind the parties, and that their failure to administer the interrogatories constituted a fatal objection.

The attorney has made an affidavit that he did not know of the defect in the form of the commission until after its return, when first he saw it. But this can make no difference. He knew of the existence of the commission itself, and took the risk of proceeding under it without examining it. A similar affidavit was put forward in *Esdaile* v. *Davis*, 6 Dowl. 468; but it was held that it was sufficient to bind the party if he knew of the proceeding in which the irregularity had occurred. The same principle was recognized in *Harrington* v. *Fall*, 15 U. C. C. P. 546.

In such a case as the present there is no merit whatever in the objection. It is the veriest technicality imaginable. To give effect to it would be to pervert a rule established for the protection of parties. The attorney

went to the examination knowing that no written interro gatories had been furnished to him. Of what service could it have been to find that the commissioner had such? Both parties had the opportunity of examining by the method that under such circumstances is by far the most satisfactory. The examination was not completed at one sitting. There was an adjournment, and, doubtless, the commissioner would have granted more. It is impossible to see that in any way whatever the defendants were placed at any disadvantage, and I am glad to feel that we are not forced to give effect to the objection.

The objections to the style of cause likewise appear to me to be waived.

In my opinion the application should be granted, the order of the Referee restored, and the defendants should pay all the costs of this application, as well as those of the proceedings in Chambers, both before the Referee and on the appeal.

BAIN, J., delivered a written judgment, concurring.

ROE v. MASSEY MANF'G. CO.

FEBRUARY 13, 1892.] [FULL COURT—TAYLOR, C. J. DUBUC, J. BAIN, J.

Interpleader—Fraudulent preference—Intent—Validity of chattel mortgage—Act respecting assignments.

Interpleader issue. Verdict entered by Killam J. in favour of plaintiff.

Plaintiff claimed goods under two chattel mortgages from the judgment debtors as against defendants' execution. The first mortgage was on a pair of horses that the debtors, who were partners, had bought from plaintiff and was for the price of same, and other small amounts. The amount of the other, $900, was made up of the $600, and overdue interest on first mortage, of $166, lent debtors by plaintiff

when the mortgage was given, and several other small amounts. The learned judge held both mortgages valid and entered judgment in favour of plaintiff. Defendants appealed. The evidence went to show that the taking of the first mortgage was *bona fide*, and on the argument counsel did not press objections to it.

The second mortgage, it appeared, was executed by the debtors after the present defendants had begun actions against them, and it covered all their chattels, save the horses already included in the first mortgage. Each of the mortgagors was separately insolvent, and apparently as partners also, and the mortgage was given with the intent to give the plaintiff a preference over the present defendants; the court was not satisfied however, that the plaintiff shared in, or knew of that intent when the debtors went to him to ask him for money to pay another creditor; they said they would give him any security he chose to ask for, and he said he would require a mortgage on their crop in addition to the other mortgage, and that their stock be also included.

At the time this mortgage was given the plaintiff advanced to the debtors the sum of about $176, but the plaintiff admitted that at the time the advance was made he did not know what debts the mortgagees had besides those they told him of, and he did not inquire as to other claims.

The Act Respecting Assignments, 1886, sec. 3, sub.-sec. 4 (as amended by 50 Vic. c. 8, s. 1) provides:

> Nor shall anything herein contained invalidate a security given to a creditor for a pre-existing debt where by reason or on account of the giving of the security an advance in money is made to the debtor by the creditor in the *bona fide* belief that the advance will enable the debtor to continue his trade or business and to pay his debts in full.

Sec. 2 of said Act provides:

> Every gift, conveyance, etc . . . of any goods, chattels, etc. . . . made by any person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors,

or to give any or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall, as against them, be utterly void.

Joseph Martin for plaintiff.

Aikins, Q. C., and *W. J. Cooper* for defendants.

Held—

The mortgage could not be held good under sub.-sec. 4, *supra*, as there cannot be said to be a *bona fide* belief in a state of facts in the absence of reasonable efforts or enquiries to ascertain whether or know such a state exists.

2. The words "or which has such effect" in sec. 2 refer only to the immediately preceding clause regarding preferences, and their insertion in, or addition to the section has not had the effect of making void a mortgage or conveyance merely because its effect has been to give the creditor to whom it was given a preference over other creditors; the material inquiry in such cases must still be, as it was before, into the intent with which the mortgage or conveyance was executed; these words have not extended the operation of the section, and have had no practical effect; following *Molson's Bank* v. *Halter*, 18 S. C. 38; and *Stephens* v. *McArthur*, 2 W. L. T. 163.

3. Though the circumstances were suspicious, yet it must be assumed, as the contrary was not established, that the demand of the plaintiff for security was made in good faith and that his intention was to get the mortgage for the money he was then advancing, as well as for additional security for that already lent; and though the mortgagors were doubtless very willing that all their property should be included, so that the plaintiff should be secured to the exclusion of the now defendants, yet as it was given for a valuable consideration and in response to a *bona fide* demand or request from the plaintiff, the fraudulent intent was rebutted and the mortgage should stand; although the plaintiff had obtained a preference still the mortgage

was not void under Sec. 2, nor, of course, under the statute of Elizabeth.

Appeal dismissed with costs.

McKAY v. RUMBLE.

FEBRUARY 16, 1892.] [TAYLOR, C.J.

County Court—Order setting aside judgment ex parte—Appeal from orders of county judges—Application of Q. B. practice to county court—Costs.

Appeal from order of county judge of Brandon. Plaintiff obtained judgment by default in County Court of Brandon. Some days afterwards an attorney made application to set aside the judgment on the following affidavit:

On or about, etc., . . . I received a dispute note herein, duly sworn to, from——the defendant's attorney. Through an oversight on my part I failed to apply to file said dispute note until after judgment had been signed herein.

On this material the county judge made an order *ex parte* setting aside the judgment, on the defendant paying the costs of signing the judgment, and also ordering that the dispute note mentioned in the affidavit of the attorney be received and filed. The plaintiff appealed.

Ewart, Q. C., for plaintiff. The order could not have been made *ex parte* in the Queen's Bench, or without an affidavit of merits, and that practice prevails in this instance by virtue of sec. 47 of County Court Act of 1887.

Counsel did not appear for defendant.

Sec. 21 of Cap. 2, 54 Vic., provides that there may be an appeal by "any person directly affected by any order, decision or judgment of a judge or verdict of a jury. ... ."

Held—

The above section is wide enough to include any order made by a judge, final or interlocutory, upon the merits in an action, or upon a mere point of practice; though it seems difficult to suppose that the Legislature intended to

give an appeal in such matters, yet the words used seem wide enough to cover them.

2. "There can be no doubt the judgment should not have been set aside *ex parte*, nor, having been to all appearance regularly signed, without an affidavit of merits. Notice to the plaintiff and an affidavit of merits would have been required in the Court of Queen's Bench, by well settled practice." The county judge had no wider discretion in such a matter than a judge of the Court of Queen's Bench would have had. *Vide Murtagh v. Barry*, 24, Q. B. D., 632.

Appeal allowed; order appealed against, set aside; no costs allowed as pæcipe for appeal did not ask for costs, and no one appeared for defendant.

MONKMAN v. FOLLIS.

FEBRUARY 16, 1892.] [IN CHAMBERS—DUBUC, J.

Attorney and client—Power of attorney to compromise action after judgment.

Appeal from order of referee setting article *alias* writ of *fi. fa.* After judgment entered and execution issued, plaintiff's attorney entered into an agreement for settlement and compromise with the defendant's attorney to take a sum considerably less than the judgment, in full satisfaction for the same.

The plaintiff repudiated the settlement and also swore that he had never given his attorney any instructions, authority, or consent to compromise the action or the judgment recovered thereon, and that his instructions to the attorney were that he should collect the judgment debt and costs in the usual way. The attorney also testified that he had no authority to make such a settlement.

Monkman for plaintiff.

Ewart, Q. C., for defendant.

Held—

1. As a general rule the authority of an attorney is determined on final judgment being signed, but it seems that he may after judgment sue out execution upon it within a year, or receive the damages without execution.

2. The plaintiff by instructing the attorney to collect the judgment debt and costs in the usual way, continued his authority after judgment, and so the attorney would retain the power to bind the client by a compromise; following *Butler* v. *Knight*, L. R., 2 Ex., 109.

Appeal dismissed with costs.

BRITISH LINEN CO. v. McEWEN.

FEBRUARY 18, 1892.] [IN CHAMBERS—BAIN J.

Pleading—Embarrassing plea—Striking out—Laches.

Appeal from order of referee striking out fourth plea as embarrassing. The defendant's pleas were filed on the 4th of May, 1889, and on the 29th of January, 1890, the plaintiffs filed a demurrer to this fourth plea. In the meantime the plaintiffs had applied for and obtained several orders for extending the time for demurring or replying to the plea, and they also took out an order for the examination of the defendant thereon.

The demurrer was argued before Killam J., and on the 4th of January last he gave judgment for the defendants on the demurrer. In his judgment he remarked that the plea "should have been at once struck out had application been made for that purpose. In so far as it contains any answer to the declaration, the same defence is raised by the general issue, and, by the attempt in the last portion of the plea to raise a defence, the plea appears to be double." He held, however, that as the plea was good in substance, the defendants were entitled to judgment notwithstanding the defect in form.

After the demurrer was then disposed of, the plaintiffs obtained another order to examine the defendant on this plea, and then took out a summons to strike out the plea as embarrassing. The Referee made this summons absolute and the defendant appealed from his order.

Tupper, Q. C., and *Phippen* for plaintiffs.

Bradshaw for defendant.

Judgment—

The C. L. P. Act, 1852, s. 52, under which the application to strike out the plea was made, does not limit any time within w .ich the application must be made, but the general rule is that the application must be made without delay. But not only have the plaintiffs allowed nearly two years to elapse since the plea was pleaded, but in the meantime they have demurred to the plea, and have obtained several orders for extending the time for demurring or replying, and for examining the defendant on his plea. Under these circumstances, I am of the opinion that the application of the plaintiffs to strike out this plea should not have been entertained. By the delay and by the steps they have taken since the plea was filed they must be held to have waived any objections there may be to the form of the plea.

I allow the appeal, and reverse the Referee's order with costs.

HARRIS v. YORK, AND YORK *et al*, CLAIMANTS.

FEBRUARY 18, 1892.] [IN CHAMBERS—BAIN, J.

Interpleader—Delay by sheriff—Forfeiture of order for protection by reason of damage caused by bailiff.

Appeal by claimants from order of Referee directing an interpleader issue on the application of the sheriff of the Eastern District.

The sheriff's bailiff seized, on first December last, about twenty stacks of wheat and three of oats, on a farm where

he swore the defendant resided. A notice claiming the grain was served on bailiff by claimants within a day or two after seizure, and sheriff received the notice on or about 8th December. After service of the notice the bailiff threshed the stacks and sold a portion of the grain for $201.60, and this money and the balance of the grain is yet in the sheriffs possession. Sheriff applied for interpleader on December 23rd, assigning as the reason for the delay that he had difficulty in getting definite information from the bailiff, who lives at Morden, and from the place the seizure was made—the north ½ of sec. 1, twp. 5, range 6- west.

The claimants filed affidavits stating that shortly after the grain had been stacked a heavy storm of rain and snow had occured, which drove into the stacks, and that the bailiff, by threshing the stacks as they stood with the snow and ice in them, practically destroyed the grain, and the wheat, which if properly threshed, would have been worth from 50 to 60 cents per bushel, was not worth more than 20 cents; the stacks should have been left till spring and not threshed till the snow and ice had melted out, and the stacks dried. The bailiff's affidavit stated that the reason for threshing as he did was that shortly before he seized, both the defendant and claimant, A. N. York, had arranged with a thresher to thresh the grain as soon as he could get round to the farm on which it was, and that having heard of the arrangement after he seized, he thought it advisable that it should be carried out, as it was very difficult to get threshing done, so it was done by the thresher for him at the same time as it would have been done for others. Other facts appeared in the affidavits, but it is sufficient to state that the learned judge found that the affidavits shewed, "*prima facie*, that substantial loss had been occasioned by the action of the bailiff in threshing the stacks when he did."

Davis for claimants—The sheriff by his action has disentitled himself to an interpleader order, or at all events, to an order for protection.

Howell, Q. C., for sheriff.

Sutherland for execution creditor, Harris.

Cumberland for execution creditor, Abell.

Held—

1. If the stacks were the claimants and they have suffered by the bailiff's action, they should not be deprived of their right to take action against the sheriff.

2. The sheriff was not entitled to an interpleader as he had not applied promptly, as soon as he had notice of the adverse claim, but chose to exercise his own discretion, and, ignoring the notice of claim proceeded to thresh, and afterwards sell part of the grain; *Crump* v. *Day*, 4 C. B. 764; and *Tufton* v. *Harding*, 29 L. J. Ch., 225; *Boswell* v. *Pettigrew*, 7 Prac., 393. *Darling* v. *Collaton*, 10 Prac., 110; is unfavourable to the sheriff's contention.

Appeal allowed; order of Referee set aside with costs.

LANDALE v. McLAREN.

FEBRUARY, 19, 1892.[[DUBUC, J.

Pleading—Demurrer for want of parties and want of equity.

Demurrer to the plaintiff's bill of complaint, (1) for want of parties; (2) for want of equity.

Aikins, Q. C., for plaintiff.

Munson for defendant.

Judgment—

The bill is filed by the plaintiff to foreclose a mortgage made by the defendant in favour of three parties of whom the plaintiff is the only survivor. The first paragraph of the bill shows that in the mortgage in question the three mortgagees are described as trustees. In the sixth paragraph it is alleged that the moneys secured by the said

mortgage were the moneys of the American Mortgage Company of Scotland (Limited), and were advanced to the defendant by the said Company, and that the plaintiff and the two other mortgagees had not at any time any beneficial interest in said moneys. The next paragraph alleges the death of the two other mortgagees.

It is contended, in support of the demurrer, that the representatives of the deceased mortgagees should have been made parties as also the American Mortgage Co. of Scotland. Several cases were cited in favour of the contention; but it appears that in those cases the trustees or joint mortgagees had a beneficial interest in the mortgage moneys.

In this case, it is shewn by the bill that the deceased mortgagees had not any beneficial interest in the mortgage moneys.

The distinction is such that even under the authorities quoted I do not think the representatives of the deceased joint mortgagees would be necessary parties. But the matter is specially provided for in our own statutes, 49 V. c. 13, s. 13, and 52 V. c. 16, s. 82. Order 39, of the Equity Orders of this Court is to the same effect, and applies equally to the point raised, that the American Mortgage Co. should have been made a party to this suit.

I think the demurrer should be overruled with costs.

CASE v. LAIRD.

FEBRUARY 22, 1892.] [IN CHAMBERS—BAIN, J.

Jury—Application for trial by—Onus of proof of necessity for.

Cumberland for the defendant took out summons for order for trial by jury.

Mulock, Q.C., *contra.*

Judgment—

By 54 Vic. c. 1. s. 33, repealing sec. 33, of the Q. B. Act, 1885, it is provided that "all issues of fact in civil

cases in actions and proceedings at law shall be tried by a judge without a jury, provided that an application may be made to a judge in chambers, to have the issue tried by a jury." Prior to this enactment the rule was, that either plaintiff or defendant in an action giving the requisite notice for a jury, was entitled to have the case tried by a jury, unless the opposite party was able to obtain from a judge an order striking out the notice for a jury; and in practice the judges invariably held that the *onus* of shewing that the case was one that should not be tried by a jury lay on the party applying to strike out the notice, and that the notice should not be struck out unless some substantial reason was shown for so doing; but by the above section, the legislature very wisely, I think, in view of the expense and delay of jury trials, has just reversed the position, and now all actions except libel and slander, are to be tried by a judge without a jury unless a judge shall order, on an application that either party may make, that the action shall be tried by a jury. But as to such an application, the rule must now be that the *onus* of satisfying the judge that the action is one that should be tried before a jury, rather than by a judge without a jury, lies in the party making the application, and the order should not be made unless some substantial reason is shown for it. This view I understand, has already been expressed and acted on by my brother Killam, and I am satisfied that it is the correct one.

Taking this view, then, I must hold that I cannot make the order asked for on the material before me in this application. Mr. Cumberland files his own affidavit, and besides verifying the pleadings, merely states that he believes the case is one which can more properly be heard before a jury than a judge, and that at the trial questions of fact will arise in reference to which there appears to be contradiction between the defendant, and the plain-

tiff's agent. A statement of the solicitor's belief that the case is one that can be more properly tried before a jury than by a judge, is immaterial in the absence of facts that would lead the judge to the same belief, and the present action is not specially distinguished from the majority of actions that go to trial by the statement that questions of fact will arise in the trial in reference to which there appears to be a contradiction between the parties.

From the pleadings, and from what was said by counsel, I gather that, while there may be an issue of fact between the parties, it is not one the verdict upon which will in itself, settle the case, but that questions of the authority of agents will arise, and that if the judge had the decision of a jury in the question of fact, he would still have questions of law to decide. The question of fact involved will probably be a simple one, and the difficulty will arise in applying the law to the facts.

The defendant has failed to show any sufficient reason why the case should be tried before a jury rather than in the ordinary way, and I must refuse the application with costs.

EWART v. HANOVER.

FEBRUARY 25, 1892.] [IN CHAMBERS—BAIN, J.

Staying proceedings of action—Vexatious suit—Costs of former action.

The plaintiffs appealed from an order of the Referee staying all proceedings in this action until the costs of the defendant in a former suit brought by the plaintiffs against the defendant should be paid ; the order directed the costs of the former suit to be taxed by the master. The writ in the former action was issued in September, 1887, and was served on or about the 29th of October following ; the defendant entered an appearance in November, 1887 ; and since then no further proceedings have been taken ; the

plaintiffs were therefore out of court by the C. L. P. Act, 1852, s. 58.

C. P. Wilson for plaintiff.

Hough for defendant.

Judgment—

The application is to stay proceedings in the action until the costs in the former action are paid; and Mr. Wilson's objection, that such an application cannot be made until after the defendant has appeared, is probably a valid one. The application is analogous to one for security for costs, when the order, if granted, is that proceedings be stayed until the security be given; and an application for security for costs cannot be made until after the defendant has appeared.

But assuming that the defendant is in a position to make the application and that it is shewn that the cause of action in this and the former action is the same, or substantially the same, I do not think it can be said that this action is oppressive or vexatious; and no case has been cited in which, under circumstances at all like the present, proceedings have been stayed. The court has jurisdiction to prevent parties from abusing its process by harassing defendants by vexatious actions, but in *Corbett* v. *Warner*, L. R. 2, Q. B., 107, it was said that the summary jurisdiction should be sparingly exercised. It is, however, often exercised when a plaintiff, having previously failed in an action, brings a second action against the same defendant on the same cause of action, without having paid the defendant's costs of the first action. In the case I have just mentioned, the Court would not lay it down as a general rule that proceedings in the second action should be stayed wherever costs of a former unsuccessful litigation are unpaid, but they said, "when that is the case and the plaintiff fails to satisfy the court that there is a real, probable cause of action, though he failed to estab-

lish it in the former litigation, the proceeding is so *prima facie* vexatious and harassing that the court ought to interfere to stop it till the former costs have been satisfied."

But the present case does not seem to come within the principle of the rule at all. The former action decided nothing and it is out of court, and the defendant cannot tax against, or legally collect from the plaintiffs any costs of that action. How then is it possible to say that the plaintiffs are oppressing or vexatiously harassing the defendant by bringing the present action?

I think the appeal must be allowed and that the order of the Referee should be set aside with costs.

N. W. TERRITORIES.

RE BENTLY AND MORRIS MORTGAGES.

FEBRUARY 10, 1892.] [MCGUIRE, J.

Ter. Real Prop. Act—Registration of mortgage without production of certificate —Like registration of transfer—Amendment.

Summons on behalf of one Henry Bently, calling upon the registrar at Calgary, and one S. B. Morris to show cause why an order should not be made directing the registrar to correct and amend certificate of ownership No. 121 as hereinafter set forth.

West for the applicant, Bentley.

Jephson for the registrar, and Morris.

Judgment—

The facts are that one Gay owned a lot and had a certificate of title for it under the T. R. P. Act. He gave a mortgage thereon to said Bently on July 19th, 1889, and a subsequent mortgage to said Morris on September 27th, 1889. Bently's advocate, on 7th October, 1889, brought his mortgage to the registry office to have it registered, and Mr. Barker, who was then acting registrar, filed the mortgage, entered it in the day book and endorsed on the duplicate mortgage returned to Bently a certificate of its having been "received and filed" at "11.10 o'clock, a.m., on the 7th day of October, 1889, number 1,311 D. book, B. fol. 232." But because Bently had not produced the duplicate certificate of title issued to the owner, the acting registrar thought he could not then complete the registration and he accordingly did not enter a memorial thereof in the register, or in fact do anything further in the matter. On the 14th day of October,

1889, Morris' advocate brought in his mortgage. He made a search in the register but found only one mortgage mentioned there, namely, to one Primrose, which he paid off and had released and then gave in his mortgage for registration. He had the owner's certificate of title with him and the registrar proceeded to register the mortgage and entered a memorial accordingly in the register and on the certificate of title produced, referring to "D. B. No. 1,353, folio 236" but not mentioning the "day, hour or minute of filing." Nothing further was done until March, 1890, when the certificate of title being produced to the registrar he endorsed thereon a memorial of the Bently mortgage, and also entered a memorial thereof in the register, which memorial states that such mortgage was "registered 11.10 a.m., 7th October, A. D. 1889, No. 1,311, D. B. fol. 232," evidently taking the time from the entry in the day book. This memorial is written *under* the memorial of the Morris mortgage, both in the register and on the certificate, and so might appear to be subsequent thereto, but the contents of the two memorials show that the Bently mortgage is hereby given the priority, its number being 1,311 and its day book page 232; the Morris mortgage being numbered 1,353 and entered in the day book on page 236. Bently, however, fearing that the memorial of the Morris mortgage being so entered would thereby be given priority asks by this summons that the Morris memorial should be ordered to be cancelled, and a new memorial thereof, as of the 14th day of October, 1889, and *after* the memorial of the Bently mortgage, entered on the certificate of title, or for such further or other order as may be deemed meet.

The memorial of the Morris mortgage is unquestionably defective in not "stating the day, hour and minute of the presentation of it for registration" as required by section 42.

It ought therefore to be amended accordingly both in the register and the certificate. It does not seem to me to be material in what order the memorials are written provided their contents show the facts from which priority is to be inferred. If the Bently mortgage is entitled to priority then I think the certificate of title and register each shows those facts, at any rate they will distinctly do so when the amendment in the Morris memorial has been made.

But the question still remains, which of these two mortgages is entitled to priority of registration? There seems to be a belief prevalent that no mortgage or transfer can be registered after the issue of a certificate of title, unless and until the owner's duplicate certificate is produced for the purpose of having a memorial endorsed thereon. That belief seems to be based on the supposed meaning of sec. 62, that the owner's certificate of title is at all times evidence to all the world of the state of the owner's title and that a person proposing to deal with the owner of land may accept the certificate as showing all mortgages, transfers, &c., legally affecting the title. It might be well if such were the law as in that case there would be no need to search in the registry office. To bring that about, however, many changes in the act would be necessary. A perusal of the certificate itself, however, shows that this effect attributed to it is not possessed by it. It "certifies that A. B. is now the owner, &c., subject to the encumbrances, liens and interests notified by memorial under-written or endorsed hereon or *which may hereafter be recorded in the register of title.*" It therefore expressly gives notice that there may be encumbrances, &c., other than those "under-written or endorsed hereon." Section 60 confirms this. It says the owner "shall hold subject (in addition to the incidents implied by virtue of this act) to such encumbrances, &c., as are notified on the folio of the register, &c." Note that the

words are "on the folio of the register"—not on the certificate of title. It is necessary therefore to examine the register in searching a title, and if a mortgage, &c., appears there, even though not entered on the owner's certificate, the title is subject thereto. The danger apprehended that to register a mortgage without having the certificate of title produced on which to enter a memorial would be to allow a misleading certificate to be at large, is not therefore real.

It was also urged that "registration includes the recording of a memorial on the owner's certificate and that, therefore, until the registrar is enabled to enter such memorials thereon, he cannot complete the registration, and that it is the duty of the person applying to have a mortgage registered, to produce the owner's certificate. I do not agree with this proposition. By s. 43 it is undoubted-the registrar's duty (except where the mortgage is endorsed on the certificate), to record on the certificate a like memorial to the one entered in the register, after it has been first "entered in the register." S. 40 declares what "registration" is. "Every transfer, etc., shall be deemed and taken to be registered as soon as a memorial thereof, as hereinafter (s. 42) described has been entered in the register, etc." This is so plain that it leaves no doubt that a transfer, etc., is "deemed and taken to be registered," the moment it has been entered in the "register." As the "like memorial" to be recorded on the owner's certificate is only to be so recorded "whenever a memorial . . . has been entered in the register," *i.e.* after the entry in the register, it is clear that this is an act to be done after the instrument is already "deemed and taken to be registered," and is no part of the registration—nor a condition precedent thereto. That being so the registration can be completed without production of the owner's certificate. In this case then, the acting registrar could have completed

the registration of the Bently mortgage the same day it was given in for registration. Moreover it was a duty imparative on him to register it, before registering any other instrument affecting that land. S. 41 says, "every instrument *shall* be registered in the order of time in which it is presented for that purpose." It was therefore his duty to have forthwith completed the registration of the Bently mortgage—unless some provision of the act required him to postpone doing so until the production of the owner's certificate. But I cannot find any such provision. In s. 59 provision is made that where two conflicting instruments are brought in at the same time priority is to be given to the one presented by him who produces the owner's certificate of title. But even here it is not said that the other instrument is not to be registered because the party presenting it has not got the certificate. It is also by implication declared that an instrument may be registered without production of the certificate, for if only he who produces the certificate could have his instrument registered, then this provision in s. 59 would be needless, as the other instrument would not be entitled to registration at all.

But it is then contended that granting that the registrar could and should have at once completed the registration of the B. mortgage, as a matter of fact he did not do so—and that mortgage was therefore not to "be deemed or taken to be registered," until the proper memorial was entered in the register, and this not being done until long after the 14th October 1889, when the Morris mortgage was presented for registration—the Bently mortgage had not on that day (ss. 41, 59) become "effectual to . . render such land liable as security, etc.," and the moment the Morris mortgage was registered, it did become so effectual —and the land was charged therewith, and it was not until March 1890, that the Bently mortgage became effectual as an encumbrance on the land.

This is a very strong argument in favor of giving priority to the Morris mortgage, and it is the one which has given me the only serious cause for hesitation which I have felt. Morris may well complain that had the acting registrar done his duty, the search made in the register would have disclosed the prior mortgage and saved him from advancing his money. On the other hand Bently might well complain that it would be hard on him, if after having done all that was necessary for him to do as to having his mortgage registered, namely, "giving it in for registration," (s. 39) and after getting a certificate that it had been received and filed and entered in the day book, he should lose his priority because the registrar neglected to go on and discharge his duty—a duty in which Bently was justified in assuming would be properly discharged and which required and admitted no farther act or intervention on his part. Here then are two innocent parties, one of whom through no fault of his, must incur the risk of loss. Which is it to be? The argument would occur to one that Bently having done all that he could do, or was required by the Act to do, ought not to be prejudiced by the neglect of duty of a public official,—see *Tiffany on Registration*, 40-41, and judgment of Harrison, C.J., in *Laurie* v. *Rathbun*, 38 U.C., Q.B., 262.

However, I do not find myself driven to determine the weight due to such an argument; for s. 39 appears to present a solution. It provides that "every instrument given in for registration" shall be entered in the day-book, by a short description, with the day, hour and minute of filing (which was done in the case of the Bently mortgage on 7th October, 1889,) and for the purpose of priority between the mortgages . . *the time of filing* shall be taken as *the time of registration.*

Now, by s. 41 "instruments registered in respect of, or affecting the same estate or interest shall . . . . be

entitled to priority, the one over the other, according to the time of registration." But as we have seen "the time of registration" is "the time of filing," therefore such instruments are entitled to priority according to the time of filing. Both sections therefore require that the Bently mortgage should have priority over the Morris mortgage subsequently filed. If any doubt were left of the intention of the act, it would seem to be removed by the latter portion of s. 39 which directs that in entering memorials the registrar "shall take the time from the day book as the time of registration." What day, hour and minute, then, was the registrar obliged to state in the memorial entered in the register and on the owner's certificate on March, 1890, when he completed the registration of the Bently mortgage? Surely it was "11:10 a. m. on the 7th day of October, 1889," the "time of filing," and this is what the registrar has in fact done. Since then that is also the "time of registration" and since priority is to be given according to that time, it follows that the Bently mortgage is entitled to such priority. Having reached this conclusion it is not necessary to consider whether the defect existing in what purports to be the memorial of the Morris mortgage in the register and on the certificate, namely, the omission to state thereon, as required by ss. 40, 42, 39, the day, hour and minute of filing or registration is sufficient to render such memorial invalid and ineffectual. It will be remembered that by s. 40 until a memorial, as described in the act, is entered on the register, registration is not complete. Clearly what purports to be a memorial in the case of the Morris mortgage is not such as described in s. 42, and it might have been urged that the Morris mortgage in not itself duly registered. I shall express no opinion on this, further than to require the registrar to amend such memorial by stating therein the time of registration. It has been suggested that the

day book being prescribed by the act just as much as the register, and nothing being said as to what or any books, parties interested are to search, that Morris' advocate should have examined the day book where he would have discovered the Bently mortgage. For the reason already given I do not feel called on to express any opinion on this point. The order I make is that the registrar, without any charge therefor to the parties, shall amend the memorials in the register and on the certificate, No. 121, by stating the time of registration, and that it is not necessary to invert the order of the memorials affecting these two mortgages, as the contents show which has priority.

Solicitor for applicant: *C. C. McCaul*, Lethbridge.

Solicitors for respondents: *Conybeare & Galliher*, Lethbridge.

THE

WESTERN LAW TIMES REPORTS.

EDITOR:
ARCHER MARTIN,
BARRISTER-AT-LAW.

SUPREME COURT OF CANADA

ASHDOWN. v. MANITOBA FREE PRESS CO.

NOVEMBER 16, 1891.]

Libel—Provisions of Act relating to newspapers—Compliance with—Special Damages—Loss of custom—50 V., cc. 22 and 23.

By section 13 of 50 V., c. 22, (Man.) "The Libel Act," no person is entitled to the benefit thereof unless he has complied with the provisions of 50 V., c. 23, "An Act respecting newspapers and other like publications." By section 1 of the latter act no person shall print or publish a newspaper until an affidavit or affirmation, made and signed, and containing such matter as the act directs, has been deposited with the prothonotary of the Court of Queen's Bench or Clerk of the Crown for the District in which the newspaper is published. By section 2 such affidavit or affirmation shall set forth the real and true names, etc., of the printer or publisher of the newspaper, and of all the proprietors, and by section 6, if the number

of publishers does not exceed four the affidavit or affirmation shall be made by all, and if they exceed four it shall be made by four of them ; section 5 provides that the affidavit or affirmation may be taken before a Justice of the Peace or commissioner for taking affidavits to be used in the Court of Queen's Bench.

McCarthy, Q.C., for appellant.

Robinson, Q.C., for respondents.

Held—

Affirming the decision of the Court below, 1. W. L. T., 102, that 50 V., c. 23, contemplates, and its provisions apply to the case of a corporation being the sole publisher and proprietor of a newspaper.

2. That section 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper, and prints and publishes the same—Gwynne J., dissenting.

3. That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director.

4. That in every proceeding under section 1 there is the option either to swear or affirm, and the right to affirm is not restricted to members of certain religious bodies or persons having religious scruples.

5. That if an affidavit or affirmation purports to have been taken before a commissioner, his authority will be presumed, and need not be proved in the first place.

Section 11 of the Libel Act requires actual malice or culpable negligence to be proved in any action for libel, unless special damages are claimed.

Held—

That such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand.

Held further—

That a general allegation of damages by loss of custom is not a claim for special damages under this sectien.

Per Strong J.—

Damages by loss of custom must be specifically alleged and the names of the customers given, otherwise evidence of such damages is inadmissible.

Appeal dismissed with costs.

WHELAN v. RYAN.

NOVEMBER 17, 1891.]

Assessment and taxes—Irregular assessment—By-law—Validating acts—Effect of—Crown lands.

In 1879 lands were purchased from the Dominion Government, but patent did not issue until April, 1881. The patentee conveyed the lands, which in May, 1882, were mortgaged to R. In 1880 and 1881 the lands were taxed by the municipality in which they were situate and the taxes not having been paid, they were in March, 1882, sold for unpaid taxes. The purchaser at the tax sale received a deed in March, 1883, and by conveyances from him the lands were transferred to W., who applied for a certificate of title thereto. R. filed a caveat against the granting of such certificate.

By the statutes under which the lands were taxed, the municipal council must, after the final revision of the assessment roll in every year, pass a by-law for levying a rate on all real and personal property assessed by said roll. No such By-law was passed in either of the years 1880 or 1881.

45 V., c. 16, s. 7, makes all deeds executed in pursuance of a sale for taxes valid, notwithstanding any informality in, or preceding the sale, unless questioned within one year from the date of their execution, and 51 V., c.

101, s. 58, provides that "all assessments made and rates heretofore struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby."

S. H. Blake, Q.C., for the appellant.

Gormully, Q.C., for the respondent.

Held—

Affirming the decision of the Court below, 1, W. L. T., 30 and 104—Patterson J., dissenting—that the assessments for the years 1880 and 1881 were illegal for want of a by-law, and the sale made for unpaid taxes thereunder was void.

Held per Strong and Gwynne, JJ.—Patterson J., dissenting.

1. The Acts, 45 V., c. 16, sec. 7, and 51 V., c. 101, s. 58, only cure irregularities, and will not make good a deed that was absolutely void as in this case.

2. That until the patent was issued by the Dominion Government, these lands were exempt from taxation. The patent did not issue until April, 1881. Hence the taxes for which the lands were sold accrued due while they were vested in the Crown.

Held per Strong, J.—

Following *McKay* v. *Chrysler*, 3 S. C. R. 436, and *O'Brien* v. *Cogswell*, 17 S. C. R. 420, that the defects cured by 45 V., c. 16, s. 7, are only irregularities in the proceedings connected with the sale, as distinguished from informalities in the assessment and levying of the taxes.

Appeal dismissed with costs.

MANITOBA.

IN THE QUEEN'S BENCH.

BRITISH LINEN CO. v. McEWAN.

MARCH 5, 1892.] [FULL COURT—TAYLOR, C. J. DUBUC, J. BAIN, J.

Pleading—Demurrer—Foreign judgment—Defences to—Interpretation of Q. B Act, 1885, s. 45, s. s. 2—Statute of limitations.

Action on a foreign judgment.

Pleas :

3. And for a third plea, the defendant says that he was not at the time of the commencement of the suit in which the alleged judgment was recovered or at any time thereafter previous to the recovery of the alleged judgment, resident or domiciled within the jurisdiction of the said court, or within Scotland, and the defendant was not at any time before the recovery of the alleged judgment served with any process or complaint, or any proceedings in the said suit, nor did the defendant appear in the said suit, nor had he before the recovery of the said alleged judgment any notice or knowledge of any process, summons or complaint, or of any process in said suit, nor had he any opportunity of defending himself therein.

4. And for a fourth plea, the defendant says that the said alleged judgment is not a final judgment, nor is it a judgment upon which the plaintiff's claim in this action or any part thereof can be sustained.

6. And for a sixth plea, the defendant says that the alleged causes of action in respect of which the alleged judgment was recovered did not accrue within six years before the commencement of the said suit in the declaration mentioned, or within six years before this action.

Demurrer by plaintiffs. Killam, J., allowed the demurrer to the third plea, but over-ruled it as to the fourth and sixth. Plaintiff appealed from so much of this judgment

as over-ruled the demurrer to the sixth plea, and the defendant appealed against the allowance of the demurrer to the third plea.

Tupper, Q.C. and *Phippen*, for plaintiffs.

Richards and *Bradshaw*, for defendant.

Held—

1. The third plea could not be distinguished from the ninth in *Fowler* v. *Vail*, 27 U. C. C. P. 417; 4 Ont. App. 267, and was therefore bad. Had it alleged, in addition, that the defendant was not a native or citizen of Scotland, it would have been good. *McLean* v. *Shields*, 9 Ont. 699, distinguished on this ground.

2. Sec. 45, sub. sec. 2, of the Queen's Bench Act of 1885 * means that a defendant in an action on a foreign judgment can plead to the action on the merits, or set up any defences which he might have set up in the action on the original cause of action in the foreign court.

Per Taylor, C. J.—"I cannot see how it can be held that a defendant can plead, in an action on a judgment, a defence which he might have set up to the original cause of action had it been sued upon in this court, so long as the words, 'which might have been pleaded,' stand as they do in the statute . . . The defendant can set up any defence which he might have pleaded to the original cause of action in Scotland, and he seeks by his plea to set up the statute of limitations. Whether that would have been a defence in Scotland, is a question of foreign law. He has not pleaded the foreign law, and it is necessary to do so, therefore the plea is bad."

Plaintiffs' appeal allowed with costs, and defendant's appeal dismissed with costs.

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* That act provides that a defendant in any action upon a foreign judgment "may plead to the action on the merits, or set up any defence which might have been pleaded to the original cause of action for which such judgment has been recovered."

TAYLOR v. GARDINER.

TAYLOR, C. J.
MARCH 5, 1892.] [FULL COURT—KILLAM, J.
BAIN, J.

Sale of goods—Warranty of horse—Authority of agent to make.

Appeal from judgment of Dubuc, J., allowing defendant's counterclaim for $600, and entering verdict for him for $225, being balance in his favour on all the issues joined.

Joseph Martin for plaintiff.

W. J. Cooper for defendant.

The plaintiff, who was a saw-miller and also a farmer, intrusted the custody of a certain horse to one Mitchell, a horse-dealer, to take to Manitoba and sell. He gave Mitchell no authority to warrant the horse, but handed him the pedigree, leaving the selling and the price entirely in his hands with instructions to dispose of the horse to the best advantage. This Mitchell did, and sold him in Manitoba to the defendant, who dealt with Mitchell as the owner, and knew nothing of the plaintiff. Part of the purchase price of the horse was taken in promissory notes in Mitchell's favour, which were transferred to the plaintiff who brought this action. The defendant counter-claimed for damages for breach of warranty. The learned judge at the trial found that the horse was sold to the defendant for breeding purposes, with a warranty that he was an imported Clydesdale, and allowed the defendant $500 on the counter-claim as damages. He further allowed the defendant $100, apparently for loss of the season and for the expenses and keep before it was ascertained that the horse was useless for the special purpose for which he was bought. The warranty was express that the horse was an imported Clydesdale, but there was no evidence of any warranty that he was a good breeder.

It was contended on behalf of the plaintiff that Mitchell had, under the circumstances, no implied authority to give the warranty and bind the plaintiff.

Held—

1. The plaintiff, by his actions, authorized Mitchell to make all such warranties as are usual in the ordinary course of business of selling horses, and to do all that was necessary and usual to be done to obtain a purchaser.

2. Though the horse was bought for breeding purposes, yet there was not, from that circumstance, any implied warranty of fitness for that purpose—*Simcoe Agric. Soc.* v. *Wade*, 12 U. C. R. 614.

3. The allowance of the $100 as damages as above could not stand, as there was no warranty for breeding purposes, and the allowance of $500 on the warranty of the horse being a Clydesdale, should be reduced to $375.

Verdict for plaintiff for $447.60, and for defendant for $375 on counter-claim. Original verdict for defendant for $225 set aside, and verdict for plaintiff entered for $72.60 with costs of motion in Term.

SPARHAM v. CARLEY.

TAYLOR, C. J.

MARCH 5, 1892.] [FULL COURT—DUBUC, J.

KILLAM, J.

Pleading—Demurrer to pleas in part—Effect of when too narrow is discontinuance—Amendment—Costs of.

Appeal by defendant from decision of Bain, J., overruling a demurrer.

The plaintiff sued the defendant on several counts, of which three were on special agreements to pay in different ways a promissory note of the defendant in favour of the plaintiff. Among other defences, the defendant pleaded to these three counts that the promise in each of the counts

set up was in writing and in certain words set out in the plea. The plaintiff then demurred to the plea in so far as it was pleaded to two of the counts. Bain, J., allowed the demurrer.

Elliott for defendant:—The plaintiff could not properly thus demur to the plea in part, and the doing so worked a discontinuance which entitled the defendant to judgment upon the demurrer.

Ewart, Q.C., and *Bradshaw* in reply.

Judgment—Delivered per Killam, J.

It appears clear that the plea, if bad, as not being an answer to the two counts, was wholly bad. *Stephen on Pleading*, 355; *Chitty on Pleading*, vol. 1, pp. 572, 594; *Webb* vs. *Martin*, 1 Lev. 48; *Calvert* vs. *Moggs*, 10 A. & E., 632; *Phillips* vs. *Claggatt*, 10 M. & W., 102; and *Chappell* vs. *Davidson*, 18 C. B., 194. This principle has been adopted in this court in *Robertson* vs. *Winnipeg*, 6 M. R., 483; and *Brown* vs. *C. P. R. Co.*, 3 M. R., 496.

The demurrer, then, should have been to the plea as a whole.

In *Com. Dig.*, vol. 6, p. 202, Pleader (Q. 3.) it is said a demurrer ought to be to the whole plea, otherwise it is a discontinuance. And in *Chitty on Pleading*, vol. 1, p. 697, it is said, "if a plea, avowry or replication be bad in part, it is bad for the whole, and in that case the demurrer should be to the whole plea or replication, or it will be a discontinuance."

The case of *Tippet* vs. *May*, 1 B. & P.. 411, shows that the result of such a discontinuance is that judgment should go against the plaintiff upon the demurrer, but that the defect may be remedied by amendment.

The plea was framed with intent to show that the promise set up in these counts of the declaration was without consideration. The question thus raised was fully argued before us, and I am of opinion that upon that point

the judgment of my brother Bain was correct. There might have been a consideration not disclosed by the writing, and there is no denial of their having been such.

The point to which we give effect was not raised upon the original argument of the demurrer, and I think that the plaintiff should be allowed to amend his demurrer without costs, and that the judgment allowing the demurrer should be affirmed upon an undertaking of the plaintiff, to be embodied in the rule, to forego all costs of the demurrer. The defendant to be at liberty, if he has not already done so, to plead the general issue to the three counts.

FISHER v. BROCK.

MARCH 5, 1892.] [FULL COURT—TAYLOR, C. J. DUBUC, J. KILLAM, J.

Interpleader Issue—Variance—Amendment—Chattel mortgage—Description of chattels—Fraudulent preference and intent.

Interpleader issue.

Appeal by plaintiff from non-suit entered by Bain, J., reported, vol. 1, p. 173.

Ewart, Q. C., for plaintiffs.

Culver, Q. C., for defendants.

Plaintiffs were members of a firm styled "M. Fisher, Sons & Co.," and their individual names, as given in the first of the chattel mortgages in question, were Edward Fisher, Robert Mar Shaw, Joseph Whitely Shaw, William Dale Shaw and Richard L. Gaunt, the younger. In the issue Robert Mar Shaw was styled Robert Mar Fisher, and Richard L. Gaunt, the younger, was called Richard L. Gaunt.

Held—

As the proper parties were before the court and their identity was established and it was clearly shown

that the other side had not been led into error, or in any way prejudiced by the error of name found in the pleadings, the amendment asked for at the trial should have been allowed. *Brock District Council* v. *Bowen*, 7 U. C. R. 471: *Trent* v. *Marshall*, 10 U. C. C. P. 329; *Brophy* v. *Gananoque*, 26 U. C. C. P. 290; *Farrell* v. *London*, 12 U. C. R. 343; *Bruce* v. *Cromar*, 22 U. C. R. 321; *In re Fraser*, 2 Ch. Ch. 457; *Carpenter* v. *Parker*, 3 C. B.N. S. 237; *Moore* v. *Bradley*, 5 M. R. 49.

2. Sec. 222 of the C. L. P. Act is wide enough to embrace an interpleader issue, and the trial judge had power to direct the required amendments. See *Green* v. *Lord Penzance*, 6 App. Cases 671, for meaning of "cause," and the interpleader order and issue are certainly proceedings in a civil cause.

The goods covered by the mortgage were set out in a schedule annexed thereto.

A witness, a clerk of the mortgagor, testified that he had made out the list, that he had been ten years connected with trade and accustomed to make stock lists, and that the goods were so described in the schedule that business men accustomed to make up their annual sheets would have no difficulty in understanding what was meant by such description.

In the schedule were set out for example:

5 yds. ¾ panting	2 15	10 75
2½ " "	1 80	4 50
2½ " "	1 55	3 88
&c. &c.		
5 yds. ¾ com. panting	1 50	3 75
5 " " "	1 80	4 50
5 " " "	1 50	3 75
&c. &c.		
2½ yds. ¾ fine panting	1 15	2 88
2½ " " "	2 25	5 63
2¼ " " "	1 80	4 50

6½	" ¾ tweed suiting			1 15	7 48
6½	"	"	"	1 30	8 45
6½	"	"	"	1 15	7 48

Held—

A sufficient description within the meaning of *Hovey* v. *Whiting*, 14 S. C. R. 515.—Killam, J., dissenting.

A merchant having a number of creditors and not being able to pay them, but thinking that an extension of time would enable him to settle all his liabilities, gave to the plaintiffs, who were his largest creditors, a chattel mortgage on his stock. They had not exercised very strong pressure to obtain this security, and had not sued or threatened to sue. It did not clearly appear from whom the suggestion emanated that the mortgage should be given, but later on the plaintiffs pressed for it and complained that the debtor had secured another creditor by a real property mortgage. After giving the mortgage the debtor carried on his business, paying some of his smaller creditors in full and others partially. He also sold a portion of his stock at a sacrifice and obtained notes which he transferred to certain creditors and so satisfied them. At the time he gave the mortgage he had no doubt but that he would be able eventually, through the extension of time obtained as above, to pay off all his liabilities, but owing to the failure of the crop in 1889 this prospect was not realized, his business was very seriously affected and he became unable to meet his engagements.

Held—

That, following *Molson's Bank* v. *Halter*, 18 S. C. R. 88, and *Stephens* v. *McArthur*, 2 W. L. T. 163, though the mortgagor was unable to pay his debts in full at the time of giving the mortgage, yet it was not given with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other credi-

tors, or over any one or more of them (49 V. c. 45, s. 2), and was therefore valid.—Killam, J., *dubitante.*

Non-suit set aside; verdict for plaintiffs entered, and appeal allowed with costs.

ALLOWAY v. CAMPBELL.

MARCH 5, 1892.] [FULL COURT—DUBUC, J. KILLAM, J. BAIN, J.

Caveat—R. P. Act—Petition—Effect of withdrawal of application on—Jurisdiction of Q. B—Construction of rules—Costs.

Application to vary order of Taylor, C. J., upon a petition of caveator, Campbell. The petition alleged title in fee simple, and prayed a declaration to that effect, and such further relief as should seem meet. On the hearing of the petition an issue was directed, the caveatee, Alloway to be plaintiff. On the trial of the issue the plaintiff was nonsuited. The petition was then brought on again for hearing when it appeared that the caveatee had withdrawn his application for a certificate of title, under R. P. Act, 1889, sec. 46. The petitioners sought an order in accordance with the prayer of the petition declaring them to be entitled to the estate in the lands as claimed, and for costs of the proceedings. The caveatee objected that the petition could not be further prosecuted. The learned Chief Justice held that he could not direct the issue of the certificate of title to the caveator, because there was no application then pending before the District-Registrar, and refused to make any order except for payment of the costs of the proceedings. The caveator appealed.

Ewart, Q.C., and *C. P. Wilson* for the appellant.

Howell, Q.C., and *Cumberland* for the respondent.

Held—

1. The rules in schedule R., are applicable to proceedings under caveats filed for all purposes under the act of

1889, therefore it would be wrong to pay too much attention to particular expressions upon the assumption that they were directed towards caveats filed forbidding the bringing of land under the act.

2. When a petition is finally decided in favor of a caveator, and it has been found after investigation that his title is a good, safe-holding one, the court may order the District-Registrar to issue a certificate of title to him; the plaintiff in the issue here having failed to establish that he was the owner, the learned judge might, after investigation, have made such an order in favour of the defendant, but the caveatee having in the meantime withdrawn the application, which is the foundation of all the proceedings in court, the jurisdiction of the court to proceed further in the matter came to an end, other than to order the applicant to pay compensation to the caveator for the expense he has been put to by the application.

3. Section 46 permits the applicant to withdraw his application at any time.

Order of the Chief Justice affirmed, present application dismissed with costs.

VELIE v. RUTHERFORD.

MARCH 7, 1892.] [DUBUC, J.

Married woman—Action against where no separate estate—Proof of is necessary.

Appeal from verdict of judge of county court of Selkirk. Action on promissory note made by defendant, a married woman, by her husband as her attorney.

One of the objections taken at the trial was that it was not shown that the defendant had any separate property. The county judge entertained the objection.

Elliott, for the plaintiff, appealed.

Kennedy, Q. C., in reply.

Held—

"As to the ground that it was not proven that the defendant was possessed of separate property, I think that under *Darling* v. *Rice*, 1 Ont. App. 43, and *Lawson* v. *Laidlaw*, 3 Ont. App. 77, the objection was well taken."

Appeal dismissed with costs.

FRIESEN v. SMITH.

MARCH 7, 1892.] [DUBUC, J.

County Court—Jurisdiction of—Time to take objection to.

Appeal by defendant from the finding of the County Judge of Manchester, entering verdict for the plaintiff for $144.53.

The question of jurisdiction was raised by the defendant in his dispute note filed, but when the case came on for hearing the defendant allowed the trial to proceed without raising any objection, and it was only after the case had been fully heard that the point as to the jurisdiction was raised. The County Judge found that the objection was waived and that the issue was, in effect, tried by consent.

Colin H. Campbell for defendant, appellant.

Phippen for plaintiff, respondent.

Held—

That after a consideration of the cases of *Archibald* v. *Bushey*, 7 Prac. 304; *Stephens* v. *La Plante*, 8 Prac. 52; *Jenkins* v. Miller, 10 Prac. 95; *Friendly* v. *Needler*, 10 Prac. 267; and *Broad* v. *Perkins*, 21 Q.B.D. 533, it appeared that although the question of jurisdiction was raised by the dispute note, yet the objection should have been taken at the opening of the case; and the learned judge having found that by omitting to raise the objection at the proper time the defendant had waived such objection, his finding should not be interfered with.

MORRISON vs. ROBINSON.

MARCH 11, 1892.] [KILLAM, J.

Jury notice—Necessary material to obtain jury.

Cumberland on behalf of the defendant, took out a summons for a jury pursuant to 48 V., cap. 15, sec. 23, as amended by 54 Vic., cap. 1, sec. 33.

Phippen for the plaintiff, opposed the motion.

Judgment—

There is nothing in the material produced to show that the order ought to be made for trial by jury. Now that a party cannot have such a trial without an order, the applicant must show some ground for making the order. It cannot be sufficient that there should, apparently, upon the record be issues of fact between the parties, for by the statute issues of fact are not to be tried by jury unless an order be made for the purpose.

Apparently the real controversy in this case arises upon the defendants counter claim for breach of contract. But there is nothing to show what, in that respect, is the dispute between the parties, whether it concerns the terms of the contract, the alleged breaches, or the damages; whether it is likely to depend upon questions of law, or questions of fact. As to the alleged damages, the defendant's depositions naturally suggest that any amount recoverable depends upon considerable computation of figures, a very undesirable element in a trial by jury. This, of course, is not so clear that the suspicion should cause the refusal of the order, if otherwise some reason for making it were shown. I merely refer to it as suggesting a consideration likely to be of importance in such applications. In the present case there is really nothing shown except the defendant's wish for a trial by jury. When an order is

sought something must be shown to warrant active interference, and as there is nothing, I refuse the order—costs to be costs in the cause to the plaintiff in any event of the cause.

KERR v. DESJARLAIS.

MARCH 12, 1892.] [KILLAM, J.

R. P. Act—Notice of trial by defendant—Service of notice on attorney.

On the hearing of a petition under the Real Property Act the judge directed an issue to be tried, and ordered that either party should be allowed to give notice of trial. Defendant gave notice of trial on February 29th for the 15th of March, and served notices on an attorney who was at that time acting for the plaintiff, and also on Messrs. Munson & Allan, who had theretofore been acting as agents for Mr. Smith Curtis, (the solicitor who had filed the petition on behalf of the plaintiff) but were not his booked agents under rule 32.

Mulock, Q. C., moved on the 5th of March to set aside the notice of trial, on the ground that a caveatee or defendant cannot, in matters under the Real Property Act, 1889, serve notice of trial; and also on the ground that such notice of trial in this matter had not been served on the attorney on the record.

Chaffey in reply.

Held—

1. Under the order directing the issue made in this case notice of trial might be given by defendant, as the effect of the order was to fix the time of trial conditionally.

2. Assuming that in such a matter there might be an attorney on the record, as in an ordinary action, service otherwise than through him would be irregular.

3. If the notice had been served on the attorney, though not addressed to him, it would, especially in view of the circumstances, have been allowed.

4. To succeed in such a motion as the present, every method of service should be negatived, which was not sufficiently done here.

Summons dismissed with costs, which were fixed at $8.00.

LIVINGSTONE v. ROWAND.

MARCH 19, 1892.] [IN CHAMBERS—KILLAM, J.

Costs—Review of taxation—Counsel fees on demurrer—Interpretation af tariff—Discretion of Master—Costs of leave to plead and demur—Second counsel's fees.

Summons to review taxation of costs of demurrer.

Kennedy, Q. C., for defendant, for the motion.

Darby, for plaintiff, in reply.

Held—

1. Evidence not before the Master could not be put in on this application.

2. Costs of an application to plead and demur should not be taxed as costs of a demurrer when the order giving leave directed that such costs should be costs in the cause.

The counsel fees on the argument of demurrer and before Full Court were objected to as beyond the maximum amount which could be allowed by rules, and also as being so excessive that even if the Master could have taxed them, a judge should interfere. The tariff of 1875 provides, under heading "Counsel Fees":

6. Fee on argument on supporting or opposing rules on return of rule nisi, or argument of demurrer, special cases.....$10 00

7. NOTE—To be increased at the discretion of the Master to a sum not to exceed 30 00

8. Fee with brief on assessments 10 00

9. Fee with brief at trial in cases of tort or in ejectment, or in matters of contract where contested 15 00

(To be increased by taxing officer, in his discretion, to a sum not exceeding $30 to Senior Counsel, and $20 Junior Counsel, in actions of a special and important nature; provided that the Master shall have power to tax increased fees, provided that more than one counsel fee shall not be allowed in any case not of a special and important nature, nor more than two in any case.)

It appeared on reference to the Master, that it had been the invariable practice with him for over ten years, and with his predecessor in office, by and with the approval of the late Hon. Chief Justice Wood, to apply the proviso to all the previous counsel fees and to allow on arguments of demurrer and rules nisi, fees beyond the maximum fixed by item 7.

Held—

1. That this interpretation should not be interfered with.

2. That as the rules specially authorize a reference of fees discretionary with the Master to a judge during the progress of the taxation, it was too late to interfere; such a provision is an additional reason why the English practice not to interfere with such fees upon an application to review should be observed; if a party allow a taxation to close without such a reference he should be taken as having elected to be bound by the Master's judgment.

3. As there is no such proviso in the equity tariff there is more reason for interfering in cases on that side of the court.

4. The allowance of a fee for second counsel in Term was discretionary, and should not be interfered with.

Absence of proper evidence before the learned judge showing the state of facts presented to the Master on taxation commented upon.

Bill referred back to Master with instructions to disallow the items relating to the application to reply and demur.

THE

WESTERN LAW TIMES REPORTS.

EDITOR:
ARCHER MARTIN,
BARRISTER-AT-LAW.

MANITOBA.

IN THE QUEEN'S BENCH.

KERR v. DESJARLAIS.

MARCH 17, 1892.] [BAIN J.

Real Property Act—Leave to amend—Style of cause.

The plaintiff being unable to procure the attendance of a witness in the United States, applied, after notice of trial had been given by defendant, for a postponement until after present session of the Legislature (during which a bill authorizing the issue of a commission in issues under the R.P. Act was to be brought in); or in the alternative to amend the order directing the issue and permit the plaintiff to fyle a bill of complaint so that there would be a pending cause in which a commission could issue. The record had not been entered, but trial was for the Tuesday

following the Thursday when the summons was argued. All affidavits and the summons were in the cause entitled thus :

JAMES K. KERR,
v. CAVEATOR, Plaintiff.
NAPOLEON DESJARLAIS,
v. CAVEATER, Defendant.

Mulock, Q.C., for plaintiff.
C. P. Wilson, for defendant.

Held—

1. The application to postpone the trial of the issue should not be granted, the only ground alleged being that the Legislature might pass certain legislation.

2. The application to fyle bill could not be made in the matter of the issue, but should be made in the matter of the petition, the style of cause of which was :

JAMES K. KERR,
v. CAVEATOR.
NAPOLEON DESJARLAIS,
CAVEATER.

Leave to amend or consider the words "plaintiff" and "defendant" as surplusage was refused, the plaintiff having delayed greatly on making the motion ; but leave given to make a new application using the same material.

Summons discharged, costs in cause to defendant in any event.

BROWN v. MYERS.

MARCH 28, 1892.] [DUBUC J.

Partnership—Account—Receiver—Propriety of in trivial matter.

Bill for account between partners, and for appointment of a receiver. From the evidence it appeared that the plaintiff, who was the assignee of one F. the partner of the

defendant, was only $35.00 out of pocket on his purchase of the half interest.

Haney and *Acheson* for plaintiff.

W. A. Macdonald for defendant.

Held—

That while it might be that the half interest of the plaintiff in the business would be found on a reference to amount to ten pounds, and so entitle the bill to be entertained, yet the matter was so trivial that a receiver should not be appointed.

Account directed to be taken.

CENTRAL ELECTRIC CO. v. SIMPSON.

MARCH 28, 1892.] [IN CHAMBERS—TAYLOR, C. J.

Practice—Application to sign final judgment—Requirements of affidavit in support of when made by officer of Company.

Patterson, for plaintiffs, appealed from an order of the Referee dismissing a summons under section 34 of the Queen's Bench Act, 1885, to sign final judgment.

Hough in reply.

Judgment—

The plaintiffs being a corporation the affidavit in support of the summons is made by one of their officers. An objection is taken that the affidavit does not state in express terms that the deponent is a person who can swear positively to the debt or cause of action.

It is argued that it must do so and that it has been so held by my Brother Killam. On reference to him he has no recollection of so deciding, and to so hold would be contrary to the decision of the Full Court in *London & Can. Loan Co.* v. *Morris*, 1 W. L. T. 176, where it was held that if sufficient appears in the affidavit to satisfy the judge that the

deponent is a person who can properly make the affidavit, that is enough.

Here the deponent says he is treasurer of the Company and has an accurate knowledge of the facts deposed to. He then goes on to state that the defendants are justly and truly indebted to the plaintiffs in a certain sum of money and the particulars are given. These agree with the particulars endorsed on the writ of summons served on the defendant. But it is said the agreement may be a mere coincidence ; that there may be promissory notes of the dates and amounts endorsed on the writ of summons, and there may be other notes of the same dates and amounts, and the latter may be the ones mentioned in the affidavit.

Now our statute is different from the English order from which it was taken. The English order requires an affidavit whether made by the plaintiff or any other person " verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the action." All that our statute requires is an affidavit "stating that in his belief there is no defence to the action." If the affidavit is made by the plaintiff himself, that is all that need be sworn to. If the affidavit is made by another person, it may be very proper that he should do more and speak to the amount, etc., sued for, so that the court may judge whether he is a person who can properly make the affidavit. But it is only for that purpose that it seems to be necessary he should do so. Probably if the affidavit contained the positive statement that the deponent is a person who can swear positively to the debt or cause of action it might not be required.

Here the deponent shows in the affidavit sufficient to satisfy me that he is such a person, so the affidavit must be held sufficient.

The appeal must be allowed with costs, the order of the Referee set aside and the summons to strike out the appearance and sign final judgment made absolute with costs.

RUTHERFORD v. WALLS.

MARCH 30, 1892.] [KILLAM, J.

Prohibition—Discretion—Meritorious defence—County Court Act 1887, sec. 66—Dispute note need not raise question of prohibition.

Vivian moved absolute rule *nisi* for prohibition to County Court of Selkirk.

O. H. Clark in reply.

Plaintiff sued in County Court of Selkirk when action should have been brought in County Court of Rockwood. Defendant did not file dispute note, but did file and serve a notice that he disputed the jurisdiction of the Court on grounds that the action did nor arise, nor did the defendant reside in judicial division of Selkirk. The plaintiff signed judgment in default of dispute note. The affidavits filed on this application disclosed no defence on the merits.

Judgment—

The rule should be absolute for prohibition.

I think the affidavits on which the application is based sufficient.

The decision in *Manning* vs. *Farquharson*, 30 L. J. Q. B. 22, is not applicable as the statute under which it was decided was very different from ours. By the County Courts Act, 1887, 50 V. c. 9, s. 66, a dispute note is required only when a party desires to defend the action, and section 67 merely requires the nature of the defence to be set out in the dispute note. There is nothing in all this to negative the right to apply for prohibition; while by

the English statute referred to in the case mentioned, it was positively required that objection to the jurisdiction should be set up by plea. Here the defendant is not seeking to defend the action, but to avoid being compelled to do so.

I agree entirely with the principle laid down by Mr. Justice Gwynne, in *Robertson* vs. *Cornwell*, 7 P. R. 297, that where there is nothing on the face of the proceedings to show want of jurisdiction, and the objection arises only upon showing the residence of a party and the local origin of the case of action, and the facts are not brought forward until after judgment, the granting of prohibition is in the discretion of the Court.

This principal was approved in *Archibald* vs. *Bushey*, 7 P. R. 304, and *Friendly* vs. *Needler*, 10 P. R. 267.

Here the defendant did not raise the defence of want of jurisdiction by a proper dispute note, but he notified the plaintiff of it and of his intention to apply for prohibition if the action were persisted in. Notwithstanding the notice, the plaintiff allowed the action to proceed to judgment. There is no attempt to dispute the defendant's statements as to his place of residence or the place where the note in question was made. The note purports to have been made in Winnipeg but it does not appear that the plaintiff was misled by this, or was ignorant of the real place of making. No suggestion has been made that this fact gives jurisdiction to the County Court of Selkirk.

I think, then, that I would not be justified in refusing the prohibition, although no attempt has been made to show a meritorious defence, and upon the affidavits for the plaintiff there apparently was none.

Rule absolute with costs.

SMART v. MOIR.

MARCH 31, 1892.] [IN CHAMBERS—TAYLOR, C. J.

Costs—County Court scale—Effect of counter-claim and interlocutory judgment.

Appeal by defendant from taxation of costs.

Cassidy for plaintiff.
C. P. Wilson for defendant.

The facts appear from the

Judgment—

The defendant appeals againt the taxation of costs claiming that a verdict for only $77 having been entered the plaintiff can have County Court costs only. In support of this *Pion* v. *Romieux*, 2 W.L.T. 109; 7 M.R. 591, is cited. There the only recorded verdict was one in the plaintiffs favour for $130, and on an application by the defendant to be allowed the costs of certain issues as to which he claimed that he had succeeded, my Brother Killam said it was impossible to go behind the recorded verdict. But that cannot be of general application for, as I understand the taxing master could look at the record if the contention was that the cause of action was one not within the jurisdiction of the County Court and tax costs accordingly. Here the plaintiff has a verdict for $77 but interlocutory judgment had been signed for $450, as to which the defendant did not defend the action; then there were on the record counter-claims for a large amount, so that I am of opinion the master was right in taxing the costs as he did, and the defendant's summons should be dismissed with costs.

McLENAGHAN v. HETHERINGTON.

APRIL 7, 1892.] [IN CHAMBERS—KILLAM, J.

Filing material on appeal—Adding pleas—Amendment—Effect of not giving notice of.

Appeal from order of Referee refusing application to add two pleas.

A consent order had been taken out by the plaintiff to amend a count in his declaration on covenant in a mortgage, by changing the date of mortgage, as there stated, from 1884 to 1874. The order was served and amendment made, but the amended declaration was never served, nor was any notice given of the amendment having been made. The application to add pleas was made after the lapse of several months.

McLeod for plaintiff, appellant.

Cumberland for defendant, respondent, objected, *inter alia*, that no papers had been filed on the appeal.

Held—

1. It is unnecessary to refile papers which were filed before Referee on original application.

2. The plaintiff was in error in not giving formal notice of amendment and defendant was not bound to plead until he received such notice.

Appeal allowed, leave granted to add pleas.

SUPREME COURT OF BRITISH COLUMBIA.

FOLEY v. WEBSTER.

MARCH, 1892.] SIR MATTHEW BEGBIE C.J. CREASE J. WALKEM J. DRAKE J.

Negligence—Damages—New trial—Finding of jury.

Action for $5,000 damages sustained by plaintiff, a chainer or log-roller in a mill, whose right leg was badly fractured owing to the faulty construction of the mill roll-way leading to the saw-carriage, which was slanting instead of horizontal, and also to the inefficient condition of the chock-blocks used on the roll-way.

The action was tried beforo Hon. Mr. Justice McCreight and a special jury, which assessed damages at the full amount claimed, and judgment was therefore entered in favour of plaintiff for that amount. The following are the questions submitted to the jury and the answers thereto :

Q.—Was machinery and build of mill good as regards safety of workmen ? A.—No.

Q.—Were chock-blocks sufficient ? A.—No.

Q.—(a) Was slant of rollway dangerous ; (b) or did it require sufficient blocks to render it safe ? A.—(a) Yes ; (b) Yes.

Q.—What was the inducing cause or causes of accident, having regard to slant, chock-blocks, and alleged negligence ? A.—Slant of rollway, and defective chock-blocks were inducing causes.

Q.—Could the plaintiff by the exercise of such care and skill as he was bound to exercise, have avoided the injury,

having regard to the proper discharge of his duties as chainer? A.—No.

Q.—Did plaintiff complain of the chock-blocks to the person or persons who appeared to be the authorized person or persons to whom he should complain? A.—Yes.

Q.—Did plaintiff know of slant? A.—No.

Q.—Damages, if plaintiff entitled to recover? A.—$5,000.

Q.—Did Burns promise to make chock-blocks good? A.—Yes.

Q.—What was Burns' position and authority in the mill? A.—Millwright in charge of machinery.

Q.—(a) Apart from machinery, was discipline and management of mill good; (b) and was want (if any) of such an inducing cause of accident? A.—(a) No; (b) Yes.

Q.—Was plaintiff aware of the state of the chock-blocks? A.—Yes.

Q.—Were defendants, or either of them, cognizant of defect in chock-blocks? A.—No.

Q.—If they were not cognizant onght they, or either of them, to have been so? A.—Yes; as manager and foreman the defendant, Mr. Webster, should have taken cognizance of this matter.

Q.—Did they exercise due care as to rollway and blocks being in a safe and proper condition? A.—In his capacity of manager and foreman the defendant, Mr. Webster, appears not to have exercised due care as to rollway and blocks.

Q.—If the rollway and blocks were defective, was it by reason of the personal negligence of the defendants, or did they, or either of them, know? A.—The defective conditions of the rollway and blocks appear to have been due to personal negligence on the part of one of the defendants, Mr. Webster, in his capacity of manager and foreman.

E. A. Jenns for defendants, moved for a reversal of the judgment, or for a new trial.

L. G. McPhillips and *A. E. McPhillips* in reply.

Judgment—Per WALKEM, J.

The question of a new trial is not open to our consideration, as the procedure prescribed by O. xxxix of our Rules respecting applications for new trials, has in no wise been followed. It would therefore be fruitless to point out the steps that should have been taken; besides, they are clearly indicated in the Rules, and it is sufficient to say that the defendants' counsel is now limited to his appeal from the judgment. This appeal is regulated by O. xi, Rule 4, which is as follows: "Where at or after the trial of an action by a jury, the judge has directed that any judgment be entered, any party may, without leave reserved, apply to set aside such judgment, and enter any other judgment, etc."

With reference to this Rule, the court, in *Davies* vs. *Felix*, 4 Ex, D. 35, observed: "Where the cause has been tried before a jury, the only applications allowed to be made are against the judgment as entered upon the findings of the jury, and for the purposes of these applications '*the findings must be taken as correct.*'" Hence, the findings in the present case must be so accepted: and this brings us to the point—is the judgment warranted by those findings?

The questions to the jury are so numerous and searching, and the replies so explicit, and above all, consistent, that we are fortunately relieved of the not infrequent difficulty that arises on special verdicts, of deciding what the jury meant. It is also to be observed that the unusual number of the questions is a circumstance that was highly favourable to the defendants, for had any two or more conflicting replies been given they might have disentitled the plaintiff to recover. The finding against contributory negligence exculpates the plaintiff, and clears the way for a

consideration of the defendants' liability. As to the chock-blocks, the answers of the jury that the plaintiff was, but that the defendants were not, aware of their unfitness might have been of some value to the defence had they stood alone, as the legal inference, in that event, might have been that the plaintiff voluntarily risked the consequences of their defective condition, and thus brought himself within the maxim *volenti non fit injuria.* In *Smith* vs. *Baker*; 1891, A.C. 336, the present Lord Chancellor observed that "a person who relies on the maxim must show a consent to the particular thing done." So far from the present plaintiff giving any consent to the use of the imperfect blocks, the evidence and findings of the jury show that he protested against being obliged to use them to the proper person in the mill, and in reply got a promise that they would be made serviceable. *Yarmouth* v. *France*, 19 Q. B. D. 660, was not as strong a case in this respect, but the remark of Lord Justice Lindley in that case may well be applied to the above findings. "If," observed the learned judge, "nothing more is proved than that the workman saw danger, reported it, but upon being told to go on, went on as before to avoid dismissal, a jury might properly find that he had not acted voluntarily, in the sense of having taken the risk upon himself." Besides, the jury, as appears above, found that Mr. Webster, as manager and foreman ought to have known of the bad condition of the blocks, and that their unfitness was due to his personal negligence. In *Clarke* v. *Holmes*, 7 H. and N. 937, Cockburn, C. J., laid down the rule that where, on the remonstrance of a workman, a promise is given by the master, and hence by a person legally representing him, to repair temporary defects, that promise is an inducement to the workman to continue in his employment, and, that in so doing, the workman waives none of his legal rights in respect to injuries resulting from the master's failure to

fulfil his obligation. This language exactly fits the present case. The importance of the point in question is illustrated by the several elaborate judgments given in *Thomas* vs. *Quartermaine*, 18 Q.B.D. 685; *Yarmouth* vs. *France*, 19 Q.B.D. 647 and *Smith* vs. *Baker*, before the House of Lords, last year 1891, A.C., 336. As to the slant of the roll-way the jury has found that the plaintiff was ignorant of it, and that it was, moreover, dangerous. Under such circumstances the plaintiff is protected by the legal presumption, that when he entered the defendant's service the risk of accident, in consequence of the slant, was not an element in the contract, as he knew nothing of it. Apart from this, the defendants were bound to provide such machinery and plant as would ensure his safety, as will appear by decisions which I shall presently refer to. "Liability is due," as neatly stated in *Beven on Negligence*, p. 313, "not so much to principles peculiar to the relation of master and servant as to the general principles that 'where fault is liability is'"; and the jury have found that the fault in the present case, both as to the defects in the rollway and blocks, lay with the defendants. In *Patterson* vs. *Wallace*, 1 Macqueen, 748; *Brydon* vs. *Stewart*, 2 Macqueen, 30; and *Weems* vs. *Matthieson*, 4 Macqueen, 215—all decided by the House of Lords—it was held that "where a master employs a servant in a work of danger, he is bound to exercise due care in order to have," for instance, in view of the present case, his mill machinery and plant "in a safe and proper condition, so as to protect his servant against unnecessary risks, and to have it superintended by himself or his workmen in a fit and proper manner;" and, furthermore, that "he is liable for any damage caused by defects which he knows of, or *ought* to have know of." Apart from the findings which I have been considering, the following further findings would, beyond doubt, fix the defendants with liability, ac-

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IN THE EXCHEQUER COURT OF CANADA

CORSE v. REGINAM.

MARCH 21, 1892.] [BURBIDGE, J.

Goods stolen while in bond in Customs Warehouse—Claim for value thereof against the Crown—Crown not a bailee—Personal remedy against officer through whose act of negligence the loss happens.

The plaintiffs sought to recover from the Crown the sum of $465.74, and interest, and the duty paid on the value of a quantity of glazier's diamonds alleged to have been stolen from a box in which they had been shipped at London while the box was at the examining warehouse at the Port of Montreal.

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The plaintiffs sought to recover from the Crown the sum of $465.74, and interest, and the duty paid on the value of a quantity of glazier's diamonds alleged to have been stolen from a box in which they had been shipped at London while the box was at the examining warehouse at the Port of Montreal.

On the 21st Februrary, 1890, it appeared that the box mentioned was in bond at a warehouse for packages used by the Grand Trunk Railway at Point St. Charles, Montreal, and on that day the plaintiffs made an entry of the goods at the Custom House, and paid the duty thereon, $107.10. On Monday the 24th the Customs officer in

cording to the above decisions, viz., that the machinery and construction of their mill were not such as to secure the safety of their workmen ; that the defects in the rollway and blocks were inducing causes of the accident ; and that the defects in both rollway and blocks were due to bad management and negligence on the part of the defendants, as represented by Mr. Webster, who was manager and foreman, and, as the evidence shows, also master (findings Nos. 1, 2, 3, 4, 10, 13, 14, 15.) We are therefore not left to doubt whether the accident was due to the rollway or blocks, for the jury have decided that it was due to the defects in both, and to the negligence of the defendants in allowing them to exist. Taking the verdict as a whole, it seems to me that the judgment of the court below was inevitable, and that the appeal from it must therefore be dismissed with costs. As to any question about the amount of the damages awarded, we have no power to deal with it, as it is one of the findings of the jury, and therefore one which, on a motion like the present, must be accepted as correct.

THE

WESTERN LAW TIMES REPORTS.

EDITOR:

ARCHER MARTIN,

BARRISTER-AT-LAW.

IN THE EXCHEQUER COURT OF CANADA

CORSE v. REGINAM.

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charge of the warehouse at Point St. Charles delivered the box to the foreman of the Custom House carters, who in turn delivered it to one of his carters who took it, with the other parcels, and delivered it to a checker at the Customs examining warehouse. The box was then put on a lift and sent up to the third floor of the building where it remained one or two days. It was then brought down to the second floor and examined when it was found that the diamonds had been stolen, the theft having been committed by removing the bottom of the box.

Although the evidence that the theft was committed while the box was at the Customs examining warehouse at Montreal was not conclusive, the Court drew that inference for the purposes of the case.

Held—

1. That, admitting the diamonds were stolen while in the Examining Warehouse, the Crown is not liable therefor.

2. In such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada which the law gives to the officers of the Customs to the end that such goods may be examined and appraised is given for the purpose of the better securing the collection of the public revenue. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy, except such as the injured person may have against the officers through whose personal act of negligence the loss happens.

MANITOBA.

IN THE QUEEN'S BENCH.

REGINA v. LACOUSIÉRE.

MAY 2, 1892.] [FULL COURT—TAYLOR, C. J. KILLAM, J. BAIN, J.

Practice—Appeal—Verified copy of order appealed from, and material.

An appeal was entered on the list of causes before the Full Court. A copy of the order appealed from and three copies of the material were filed with the Prothonotary. None of the papers were verified by affidavit as being true copies.

Mulock, Q. C., for the appeal.

Huggard, *contra*, objected that there was no verified copy of the order appealed from, as required by the practice of the Court.

Held—

The objection was fatal. Appeal struck out.

PER TAYLOR, C. J.—The usual practice in appeals from Chambers is to file an affidavit verifying the order appealed from, and identifying the material as exhibits to such affidavit.

MACDONALD v. HARRISON.

APRIL 5, 1892.] [BAIN, J.

Architects fees—Right to recover where cost of building exceeds estimate.

Action at the Portage Spring Assizes. *Vide* report in case on page 105.

The plaintiff sued defendants on the common counts for $213, balance due him for architect's fees. Defendants pleaded the general issue and payment.

By the terms of the engagement the plaintiff was to prepare plans for a church not to cost more than $7,500 at the outside, for which his charge was to be 2½ per cent. and 1¼ per cent. additional for the working details, also other allowances not necessary to be considered for the purposes of this report. The building was erected substantially in accordance with the plans and specifications of plaintiff, but cost about $9,800 instead of the $7,500, for which the plaintiff assured defendants it could be built.

The plaintiff claimed commission *quantum meruit*, at the above rate on $10.000.

Howell, Q.C., and *D. A. Macdonald* for plaintiff.

W. J. Cooper for defendants.

Held—

1. The plaintiff could only recover commission on the stipulated amount, $7,500.

The defendants might have counter-claimed or pleaded a set-off for any damages they migbt have suffered by the increased cost of the building, and had they done so the plaintiff might not have been entitled to recover any of his charges whatever.—*Hudson on Building Contracts*, *50*.

Verdict accordingly.

GIBBONS v. CHADWICK.

APRIL 11, 1892.] [BAIN, J.

Prohibition—Acquiesence in jurisdiction—Laches—Service out of jurisdiction in County Court—No jurisdiction because of assets in Manitoba.

Rule *nisi* for writ of prohibition to Judge of the County Court of the County of Selkirk.

The plaintiff issued a garnishing order and summons on the 24th of November last claiming from the defendant

$36.00 for breach of contract. The defendant resides in Ontario and the cause of action arose there, but on the 27th of November the County Court Judge made an order that the plaintiff should be at liberty to serve the defendant out of the jurisdiction. This order it was stated on the argument, was obtained on the application of the plaintiff's attorney showing that the defendant had assets in Manitoba to the value of $200 at least, and was granted in the view that section 47 of the County Courts Act had the effect of making section 32 of the Administration of Justice Act, 1886, applicable to the County Courts.

On the 14th of December the defendant applied to the County Court Judge to set aside the summons and service for want of jurisdiction, but the application was dismissed. The defendant did not file a dispute note, but as the action was not one in which judgment could be signed by default, it came on for trial, and counsel for the defendant attended, and, although he again took exception to the jurisdiction, cross-examined the plaintiff's witnesses. A verdict was given for the plaintiff and judgment was signed on the 29th of February. On the 3rd of March, defendant's counsel obtained a summons from the County Court Judge calling on the plaintiff to show cause why the judgment should not be set aside and the defendant again allowed in to defend the action, on the ground that the verdict and judgment had been obtained by surprise and by proceedings not in good faith. This summons was obtained on an affidavit swearing to merits and that the defence was not entered for delay, and the question of want of jurisdiction was not referred to either in the affidavit or in the application. On the return of the summons, it appeared that the contention that the verdict had been obtained by surprise had to be abandoned, but it was agreed that the summons should be treated as a motion to set aside the judgment and that the defendant should be allowed in to defend on

the merits, and it was enlarged for three weeks to enable counsel to file the defendant's affidavit.

Pending the enlargement,

Cameron for defendant, moved for prohibition.

Elliott for plaintiff, objected that the motion was too late.

Held—

1. Section 32 of the Adm. of Jus. Act deals with principles of jurisdiction, not with procedure or practice, and, at all events, as the jurisdiction of the County Courts is defined by the act, their jurisdiction cannot be extended by the application of a principle of procedure or practice in the Court of Queen's Bench, as if it were a "case not expressly provided for."—*Vide* sec. 47.

2. "If it appears on the face of the proceedings that the inferior court has no jurisdiction, a prohibition may issue after as well as before judgment, because, as Lord Mansfield said in *Buggin* v. *Bennett*, 4 Burr. 2037, all is a nullity, it is *coram non judice*. But when the want of jurisdiction is not patent, but arises from some collateral matter, and the defendant allows the court to proceed under an apparent jurisdiction, he may lose his right to move for a writ by his delay and acquiesence. In the County Courts where there are no formal proceedings the want of jurisdiction will not often be patent, and it is not so in the present case; and it has been held that, in cases of this kind, when the defendant objects to the jurisdiction in the court below the objection will be taken, on an application for prohibition, to have the same effect as if the want of jurisdiction were apparent on the proceedings, *Denton* v. *Marshall*, 1 H. & C. 660. The defendant having brought to the notice of the court below the facts that showed it had no jurisdiction, I think he has not lost his right to move in the court merely because he allowed the case to be tried and judgment to be signed, especially as on the trial he

still took exception to the jurisdiction. But in the subsequent motion to set aside the judgment and to be allowed in to defend on the merits, there seems to me to be such a complete acquiesence in the jurisdiction with full knowledge of all material facts, that I am quite of the opinion that this court should now decline to interpose. The defendant might, and should have moved at once after the judge refused to set aside the writ and service. He has deferred moving not only until after trial and judgment, but until he has made an application to set aside the judgment and to be allowed in to defend on the merits. No excuse has been given for the delay, and considering the conduct of the applicant, the importance of making an end of litigation and that the granting of the writ, though of right, is not of course, I think the application must be refused and the rule *nisi* discharged.—*Mayor of London* v. *Cox*, L. R. 2 E. & I. App. 283, *Broad* v. *Perkins*, 2, Q. B. D. 533."

Rule discharged with costs.

MACDONALD v. HARRISON.

APRIL 23, 1892.] [BAIN, J.

Costs—Certificate for, to prevent set-off of Queen's Bench costs—Under what circumstances allowable.

Application under R. S. M. cap. 1, sec. 62, s. s. (b) for certificate to prevent set-off of costs.

Howell, Q.C. for plaintiff applicant.

W. J. Cooper for defendant, *contra.*

Judgment—

This is an action that I tried at the Portage Assizes, and in which I entered a verdict for the plaintiff for $46.25. The plaintiff was employed by the defendants to prepare the plans and superintend the construction of a church they were building, and he sued to recover a balance of $213,

on an account for his professional services amounting in all, according to his particulars, to $468.

Mr. Howell asks for a certificate for costs, but concedes that he cannot expect any but one to prevent set-off of full Queen's Bench costs. Were I to grant such a certificate however, I would be certifying in effect that I thought the plaintiff had reasonable ground for believing he had the right of withdrawing the case from the County Court, and bringing it in the Queen's Bench : and this I find upon consideration, I cannot do.

The balance claimed to be payable is within the County Court jurisdiction, but according to the plaintiff's claim the account forming the subject matter to be investigated exceeds in the whole $400. The principal item in the plaintiff's claim is $375.00 for "3¾ per cent. on $10,000 estimated cost of building." The church, exclusive of the seating, has, in fact, cost about $10,000, but I found that it was a term or condition of the agreement the defendants made with the plaintiff, that the church the plaintiff was to design and plan should not cost over $7,500 at the outside, and that there was this condition seems very clear, not only from the defendant's evidence but also from the plaintiff's own letter to the defendants. The defendants began to build the church believing that it would not cost more than the sum mentioned, and even after they began to think it would cost more than $7,500, the plaintiff assured them that it would not. By his under estimate of the cost the plaintiff led the defendants into an expenditure beyond what they had intended ; and it appears to me unreasonable that he should have thought he could charge them commission on more than the $7,500, or that he should desire to do so. But charging his commission on $7,500, instead of on $10,000 as he does, his whole claim against the defendants, would be less than $400.

Then again he failed to establish that he was entitled to other items of his claim amounting to $73.00, and this amount, apart from the question of the commission, would also have reduced the claim below the $400.00. There was more excuse, perhaps, for the plaintiff thinking he was entitled to recover this $73.00 than he had for the commission he charged, but considering the whole case, I find it impossible to give the certificate I am asked for.

SCHULTZ v. ARCHIBALD.

APRIL 26, 1892.] [TAYLOR, C. J.

Real Property Act—Hearing of petition—Caveat, affidavit in connection with—Defects in.

Petition presented by caveators under Real Property Act.

C. H. Campbell for caveators produced a copy of the caveat, annexed to which was a document which began "I, etc., etc., make oath and say," and ended "and I make this solemn declaration conscientiously believing the same to be true and in pursuance of the Act respecting extra judicial oaths," and to which was added the signature of the deponent or declarant. Underneath was a memorandum "Declared before me, etc." signed by a commissioner for taking affidavits.

Cumberland, for the caveatees, objected that this document was neither an affidavit nor a statutory declaration. R. S. C. 141, s. 3, allows the making of a solemn declaration for certain purposes " in the form in the schedule to this Act;" the form in the schedule begins "I, A. B. do solemnly declare that, etc.," and ends that the declaration is made " by virtue of the Act, etc."

Held—

1. Where the option of making a statutory declaration instead of an affidavit is exercised, the exact form given in

the statute must be followed ; the document in question was neither an affidavit nor a declaration ; *Oliver* v. *Pierce*, 3 Dowl. 261 ; *Phillips* v. *Prentice*, 2 H a. 542 ; and *Allen* v. *Taylor*, L. R. 10 Eq. 52.

2. The filing of a caveat complying with the statute being a condition precedent to the jurisdiction of the court to entertain a petition upon it, and no such caveat being filed here, the petition should be dismissed with costs, fixed at $5.00. The caveator to have leave to file a further caveat ; *McArthur* v. *Glass*, 6 M. R. 224, followed.

Re LAKE WINNIPEG TRANS., ETC., CO. (LTD.) BERGMAN'S CLAIM.

APRIL 26, 1892.] [TAYLOR, C. J.

Maritime lien—Winding Up Act—Leave to proceed in Exchequer Court in Admiralty.

Vide vol. 2, pages 110 and 155. As mentioned in a prior report of this case at the last mentioned reference the application for leave to proceed in the Exchequer stood for further argument, which was subsequently heard by the learned Chief Justice.

Wade for claimant.

Mathers for official liquidator.

Judgment—

The question of the claimant's lien has now been argued. I am by no means satisfied that he has a lien, but as the question can be properly raised only by a suit in the Exchequer Court, I think he may have leave to proceed there against the steamer. If he has a lien it is only by proceeding in that court that he can get relief to the full extent to which he is entitled. In the winding-up proceedings the mortgagees would have a claim prior to his. I am therefore prepared to make an order allowing a suit to be

brought in the Exchequer Court. The costs of the present motion should be reserved until after that suit is disposed of.

MOLSON'S BANK v. CARSCADEN.

APRIL 26, 1892.] [KILLAM, J.

Equitable assignment of future earnings—Powers of bank under R. S. C. c. 120, s. 45.

Interpleader issue to try right to certain moneys attached by the defendants in the issue in the hands of the C. P. R. under various attaching orders issued in actions against Patrick Egan, Martin Egan and Anthony Egan, trading as Egan Bros. Plaintiffs claimed the money as assigned to them by Egan Bros. for securing their notes due to plaintiffs, and indorsed by Geo. H. Strevel.

Egan Bros. agreed with Strevel that if he would indorse their notes in favour of the plaintiffs to the amount of $10,000 they would give plaintiffs an assignment of all moneys to be payable to them from the C. P. R. Co. on contracts made or to be made by them with the Co., to secure the notes; they also agreed with plaintiffs, through their manager, Nicholls, that, in consideration of an advance to them of $10,000 upon such notes, they would assign to plaintiffs all moneys to be earned upon any contract with the C. P. R. Strevel indorsed the notes and Egan Bros., gave to the plaintiff, Nicholls, a power of attorney authorizing him to collect from the Co., for the use of the Bank, all said moneys, and the advances were made.

Howell, Q. C., and *Cumberland*, for plaintiffs.

Ewart, Q. C., for defendant Stewart.

Haggart for defendants Carscaden & Peck.

Darby for defendants Thompson *et al.*

Held—

The transaction amounted to an equitable assignment to plaintiffs of the sum in question, *Storey's Eq. Jur.* § 1047; *McMaster* v. *Can. Pap. Co.*, 1 M. R. 309; *Patterson* v. *Kingsley*, 25 Gr. 425: distinguishing *Rodick* v. *Gandell*, 1. D. M. & G. 763 and *Brown* v. *Johnston*, 12 A. R. 190.

2. Such a transaction was within the powers of the Bank, and sec. 45 of cap. 120, R. S. C., which governs the same, is wide enough to cover it.

3. Apart from such a question, the plaintiff Nicholls could, for the protection of Strevel and under the agreement with him, enforce the agreement.

Verdict for plaintiffs.

RITCHIE v. GRUNDY.

APRIL 26, 1892.] [KILLAM, J.

Mechanic's lien—Waiver of by accepting prom. note—Rights of owner and contractor on building contract.

Bill to enforce mechanic's lien.

Mulock, Q. C., for plaintiff.

Aikins, Q. C., for defendant.

A building contract provided that of the contract price, $500, the sum of $100 was to be paid on a specified date, $200 by a note at three months as the work progressed, and $200 on completion of work by note at three months.

Held—

1. That as the term of credit agreed upon would not expire till after the expiration of the time allowed by statute for bringing suit, such a contract implied an agreement that there should be no lien.

2. Where a party has contracted to do an entire piece of work, for which he is to be paid on completion, he can recover nothing till completion, or unless he can show that

non-completion was owing to the fault of the other party, or produce satisfactory evidence to show that the parties have entered into a fresh contract; *Appelby* v. *Myers*, 2 L. R. C. P. 660; and *Whitaker* v. *Dunn*, 3 Times L. R. 602.

3. In general the mere taking possession and using of a partially completed building attached, under such a contract, to the land of the party for whom it is constructed so that it has become his property as part of the land, does not of itself show a waiver of the right to a completion of the work or raise a liability to pay *quantum meruit*.

"Such action may, in many cases, afford evidence of acceptance of the work done as a full performance of the contract, or as a performance *pro tanto*. While, unless expressly stipulated for, time is not of the essence of such a contract, the owner, I take it, could make it so by reasonable and proper notice, and after doing so, and after sufficient default of the builder, the owner could even prevent the builder from completing the contract and enjoy the benefit of his work without liability to make payment for it. So long, however, as the contract remains open, the owner must not interfere to prevent completion, and if the circumstances are such that his taking possession and use of the property do interfere with the completion, the builder can then sue for damages or abandon the contract and sue for the value of the work done; and in many cases the action of the owner in thus taking possession may be so inconsistent with a continuance of the work, or place such difficulties in the way of the builder as to entitle the latter to withdraw and bring his action. And it appears to me that in some cases very slight circumstances would be sufficient to show either an intent to waive performance and pay for the work done, or an unintentional hindrance of, or injury to the rights of the builder sufficient to warrant the latter in declaring the

contract off—*Hudson on Building Contracts* and *Emden on Building Leases.*"

Bill dismissed.

STADTLANDER v. BRADEN *et al.*

APRIL 26, 1892.] [DUBUC, J.

Specific performance—Vendor's lien.

Bill for specific performance.

Plaintiff was owner of livery stable and plant at Selkirk. The land and buildings were subject to a mortgage to a loan company, and the chattels to a lien in favor of defendant Hodgins. Plaintiff sold lands and chattels to defendant Braden, who assumed payment of incumbrances, but subsequently refused to pay Hodgin's lien.

Haggart for plaintiff.

McMeans for defendant.

Held—

That the plaintiff was entitled to have the contract specifically performed; also that the court had jurisdiction by reason of this suit avoiding circuity of action, and that the amount due on Hodgins' claim being really a part of the unpaid purchase money, formed a vendor's lien on the property which was the subject of the sale.

CURRAN v. MUN. OF NORTH NORFOLK.

APRIL 27, 1892.] [KILLAM, J.

Solicitor's fees—Action against municipal corporation—Liability of council in absence of by-law—Evidence given before county judge must be transmitted to Queen's Bench.

Appeal from County Court of Norfolk entering verdict in plaintiff's favour for $113.16.

Culver, Q. C., for defendants, appellants.

Hagel, Q. C., for plaintiff, respondent.

The facts appear from the

Judgment—

The plaintiff is a solicitor, who sues the defendants, a municipal corporation, for his services in drawing an agreement under instructions of a committee of the council, and in visiting Winnipeg and attempting to sell debentures of the municipality. The learned judge of the county court entered judgment for the plaintiff upon the ground that the municipality accepted and took the benefit of his services. The defendants appealed.

Upon a perusal of the evidence which was taken down by the clerk of the court, I was unable to find anything to show such acceptance of his services in either respect, and counsel for the plaintiff could not point out any such evidence but claimed that same was given at the trial. To enable him to substantiate this I adjourned the matter that he might obtain a copy of the notes of the learned judge which, however, has not been furnished.

As, under the act, this court is a court of appeal upon the facts as well as the law, it is impossible to assume that there was evidence to support a particular finding of the court below unless such appears upon the material transmitted to this court.

In the present case there is no evidence appearing upon the papers to show that the council adopted the agreement drawn by the plaintiff or availed itself in any way of his services. The plaintiff states that he went to Winnipeg at request of the council, but this is too vague a statement. The council can act only by formal resolutions or by-laws, and none are produced. It must then be assumed that the request referred to was made by individual members of the council. Nothing came of the visit to Winnipeg. There

was no benefit to adopt and the council does not appear to have taken any action based upon it.

I think that the appeal must be allowed and a non-suit entered with costs of the appeal and in the court below.

NEWMAN v. LYONS.

MAY 2, 1892.] [FULL COURT—TAYLOR, C. J. KILLAM, J. BAIN, J.

Interpleader to determine priority—Form of issue and what questions may be raised thereunder—Facilitated judgment not fradulent—Fradulent conveyance void as against subsequent creditors.

Appeal from judgment of Dubuc J., entering verdict in favor of defendants *ante* vol. 2, page 145.

Interpleader issue to determine (1) whether the plaintiffs writ of *fi. fa.* was entitled to priority over that of the defendants against one William Lyons, with respect to the proceeds of the sale of goods and chattels of the said William Lyons realized by the Sheriff, and (2) whether the execution of the defendant and the judgment whereon the same is founded are preferences which render the same void as against the writs of the plaintiffs.

Aikins, Q.C., and *Cooper* for plaintiffs.

Howell, Q.C., for defendant.

The defendant, wife of the judgment debtor, recovered her judgment in an action which was begun on June 11th, 1891, appearance was entered on 12th, order for leave to sign judgment was obtained on 16th and judgment entered on the following day. The plaintiff and others had begun their action before the defendant commenced hers.

Held—

That while such judgment was undoubtedly obtained by the defendant for the purpose of getting

priority over the creditors of her husband, yet it was one obtained in a regular manner according to the practice of the court, and the fact of the husband speedily facilitating the recovery of same did not make it on that account fradulent and void under Ad. Jus. Act of 1885, sec. 122, as against the other creditors.

The plaintiff desired to show that the judgment recovered by the defendant was not a *bona fide* one, was not founded upon a valid and *bona fide* consideration, and that in fact there was no debt due from the husband to the defendant for which a judgment could be recovered.

It was objected that these matters could not be gone into under an issue as here framed, which admitted that the husband owed the debt, that the wife had a judgment therefor, that her judgment had priority, and that the only question raised was whether the plaintiff's execution was entitled to stand ahead of the defendant's; not, is the defendants execution good or bad? So long as the judgment was not obtained by any of the modes mentioned in said section 122, it being a preference merely does not render it void, to do which it must be a fradulent preference and no question of fraud is raised by the issue.

Held—

1. The plaintiff under the form of issue was entitled to go into evidence for the purpose of showing that the judgment was a fradulent one, and not for a valid and *bona fide* consideration.

2. Where a settlement is made by a man about to engage in trade or business in contemplation of possible future indebtedness, even if all debts due from him at the time of the settlement have been paid, a creditor becoming one subsequently may impeach the settlement, *McKay* v. *Douglas*, L. R. 14 Eq. 106; *Ex parte Russell*, 19 Ch., D. 588; and if a man make a voluntary settlement,

although not actually indebted, yet with a view to being indebted at a future time, it is fradulent and ought to be set aside.

On the first question, verdict for defendant set aside and verdict entered for plaintiff; on the second question the verdict should stand.

IN THE MATTER OF HER MAJESTY'S COUNSEL.

TAYLOR, C. J.
MAY 2, 1892.] [FULL COURT—KILLAM, J.
BAIN, J.

Precedence of Queen's Counsel in Manitoba.

As between themselves, Her Majesty's Counsel in Manitoba whose patents are of even date, take precedence by priority of call to the bar of that Province.

Judgment—

At a sitting of the Court during last Hilary Term, Mr. Aikins, a member of the Bar holding a patent as one of Her Majesty's Counsel, being called upon to move, if he desired to do so, in any matter, Mr. Howell, also a member of the Bar holding a similar patent, claimed to be entitled to precedence over him. The claim was made, it was said, solely for the purpose of settling a question as to the order of rank at the Bar to which three gentlemen, Mr. Aikins, Mr. Ewart and Mr. Howell, are entitled. No argument was offered, but certain facts were stated, and the matter left with the Court.

The facts stated were as follows: These gentlemen are all members of the Bar of this Province, the order in which they were called being, Mr. Aikins, Mr. Howell, Mr. Ewart. They are also members of the Bar of Ontario, the order in which they were called to that Bar being, Mr. Ewart, Mr. Howell, Mr. Aikins. The patents appointing

them to be of Her Majesty's Counsel all bear date the 3rd of November, 1884. They appear to have been recorded (in the Department of the Secretary of State) thus—the patent of Mr. Aikins on 24th November, 1884, in *Liber* 102, folio 55; that of Mr. Ewart on 25th November, 1884, in *Liber* 102, folio 58; and that of Mr. Howell on 25th November, 1884, in *Liber* 93, folio 92. Notice of their appointment was published in the official gazette on the same day, the names being placed there in the following order: Mr. Ewart, Mr. Howell, Mr. Aikins.

The patents themselves, which have been put in, are all in the same form. The patent gives the patentee rank and precedence from its date, in all courts established or to be established under any Act of the Parliament of Canada next after those persons who before 1st July, 1867, received appointments as Queen's Counsel within any of the late Provinces of Canada, New Brunswick, Nova Scotia, Prince Edward Island or British Columbia, and those persons who since the 1st July, 1867, were appointed under the Great Seal of Canada. It also gives the patentee, from the day of its date, rank and precedence in all courts in the Province of the Bar of which he is, or may hereafter become, a member next after those members of such Bar who before the 1st of July, 1867, received appointments as Queen's Counsel; those members of such Bar who, since the 1st of July, 1867, received such appointments under the Great Seal of Canada; and those members of such Bar (if any) who may lawfully be entitled to rank and precedence over the patentee.

It will thus be seen that there is nothing in the patents themselves which can be a guide to the Court in deciding the question which has been raised.

In England, a patent appointing a member of the Bar to be one of Her Majesty's Counsel, gives him rank and precedence next after Her Majesty's Counsel then being,

and after some named person. It was the same in Canada, or at all events, in the old Provinces of Canada before Confederation. This form of patent gave the patentee precedence next after the person named as a Queen's Counsel, but did not, in the event of the latter becoming a law officer of the Crown, entitle the patentee to take rank next after him while he held that office. In Upper Canada, Mr. Henry John Boulton, who held a patent giving him precedence next after Mr. Draper, on the latter becoming Attorney-General, claimed to be entitled by virtue of his patent, still to take rank next after Mr. Draper, although he would thereby take precedence over Mr. Sherwood, the Solicitor-General. But the Court held that no such claim could be entertained. See 1 U. C. R. 317.

Sometimes the patent was expressed as giving rank, not after, but before, a named person. Thus, in 1783, when Mr. Scott, afterwards Lord Eldon, was offered and had accepted an appointment as King's Counsel, he learned that Mr. Pigott and Mr. Erskine, both his juniors, were to be given rank over him, and in consequence he withdrew his acceptance, on the ground that he would not take promotion accompanied by any waiver on his part of professional rank. To this he adhered although remonstrated with by the Commissioners of the Great Seal. Mr. Peckham, who was Mr. Scott's senior, followed his example. In consequence of this, a patent having issued on the 16th of May to Mr. Erskine, another on the 21st to Mr. Pigott, a patent was on the 30th issued giving Mr. Peckham rank next after the King's Counsel then being, and before the Honourable Thomas Erskine, and on the 4th of June Mr. Scott received one giving him precedence next after Mr. Peckham. See Life of Lord Eldon, Vol. 2, p. 84.

Patents seem even to have issued giving rank next after a person, not then himself appointed. Thus, in 1840,

Mr. Turner, afterwards a Vice-Chancellor and then a Lord Justice, on the 17th of February received a patent with precedence next after Mr. Armstrong, who was not himself appointed until four days later. See 6 Bing. N. C. 336.

The patents of the three gentlemen whose relative rank is now in question, all bear the same date, and in no way indicate the rank or standing they are to have as among themselves. As already said, they contain nothing which can guide us in deciding the question of priority which has been raised.

The order in which the patents were recorded, or in which the names appeared in the official gazette, cannot be taken as disposing of the question. These would seem to be matters entirely in the hands of departmental officials. Nor can the order in which these gentlemen were called to the Bar of Ontario be accepted as deciding the rank they may be entitled to have.

Under such circumstances, in the absence of any express provisions as to their respective priority of rank contained in the patents, and of any other guide in determining the question, we are of opinion that the order of precedence which these gentlemen had as members of the Bar of this Province, before the patents were issued, and irrespective of them, must prevail. We accordingly hold that, at the Bar of this Province, and with that alone can we deal, these three gentlemen are entitled, as among themselves, to take rank and precedence in the following order, first, Mr. Aikins; second, Mr. Howell; and third, Mr. Ewart.

THE

WESTERN LAW TIMES REPORTS.

EDITOR:
ARCHER MARTIN,
BARRISTER-AT-LAW.

MANITOBA.

IN THE QUEEN'S BENCH.

GIBBONS v. CHADWICK.

MAY 3, 1892.] [FULL COURT—TAYLOR, C. J. DUBUC, J. KILLAM, J.

Appeal from County Judge—Necessity of notice to—Leave to stand for service to be made refused in trifling matter.

Appeal from BAIN, J., *ante*, p. 102.

Cameron for the defendant, appellant.

Elliott for the plaintiff, respondent, objected that notice of the appeal had not been served upon the county court judge, and produced an affidavit to that effect.

Held—

It was as necessary to serve the county court judge with notice of the appeal as it was to serve him with the rule nisi for prohibition, even though he do not generally

appear, yet he may if he choose—*Martin* v. *Mackonachie*, 3 Q. B. D. 730; 4 Q. B. D. 697.

Appeal dismissed with costs, and, as the amount at stake was trifling, leave refused to allow the appeal to stand with leave to serve the county judge.

HARDY v. DESJARLAIS.

MAY 10, 1892.] [TAYLOR, C. J.

R.P. Act—Practice on committal for non-production—Barring party in default—Filing papers on motions under R. P. Act—Practice on production.

An issue having been directed under the Real Property Act, the plaintiff obtained, on March 24 last, an order for production by the defendant on the tenth day after service on defendant or his attorney. Plaintiff's attorney took out a summons entitled in the issue calling upon defendant to show cause why he should not be barred or committed for contempt of court. The summons was served on defendant's attorney.

Mulock, Q.C. for plaintiff.

C. P. Wilson for defendant.

Held—

1. While R. S. M. c. 133, r. 6 of sch. R. provides for production, yet no method of enforcing obedience or inflicting a penalty is therein contained. If the practice in equity should prevail, then the present application is irregular, as it should be by notice of motion for commitment under G. O. 293 after four clear days' notice on the attorney, G. O. 292 and 293; Ont. G. O., 295 and 296; *Kelly* v. *Smith*, 1 Ch., Ch. 364; *Gray* v. *Hatch*, 2 Ch., Ch. 12; and *Abel* v. *Hilts*, 6 Prac. 122; here the summons was taken out on May 7, returnable on the 9th.

If the Common Law should prevail, then there should have been personal service on the client and the rule or order shewn to him, *Re Lowe*, 4 B. & Ad. 412; *Re Guard*, 6 Jur. 916, *Ex parte Willand*, 11 C. B. 544; *Re Pyne*, 7 Jur. 1109; *Thomas* v. *Rawlings*, 28 L. J. Ex. 347; and *Crysler* v. *Campbell*, 1 U. C. R. 416.

2. The defendant could not be barred as the application should have been made in the original cause or matter, *Salter* v. *McLeod*, 10 U. C. L. J., 299.

3. It seems that on a proper application, the court would have power to disbar as it would in equity have inherent power to dismiss a bill for disobedience—*Rep. of Liberia* v. *Imp. Bk.*, L. R. 9 Ch. 569; and *Rep. of Lib.* v. *Roye*, 1 App. Cas. 139.

4. Where it is impossible to comply with an order to produce, an application to extend the time should be made, if the opposite attorney will not agree to a reasonable extension.

5. The filing of an affidavit of an attorney is not a compliance with an order for production; the affidavit should be made by the client.

6. Papers and proceedings in matters under the R. P. Act should be filed in the prothonotary's office and not in judges' chambers.

7. Though in practice it is not usual to leave documents referred to in the affidavit with the officer of the court when filing the affidavit, yet by not complying strictly with the order, the party in default leaves himself open to a motion.

Summons discharged, but without costs, owing to defendant's default in not complying with order.

DOYLE v. RURAL MUNIC. OF DUFFERIN.

MAY 13, 1892.] [FULL COURT—TAYLOR, C. J. KILLAM, J. BAIN, J.

Local option by law—Repeal of by new municipality when old boundaries were co-terminous—Appeal from order of judge in chambers on application to quash—Jurisdiction to entertain.

An application had been made to Dubuc, J., to quash by-law No. 22 of the defendant's, repealing by-law No. 64 of the former Munic. of North Dufferin, which was a local option by-law under Liquor Licence Acts of 1886 and 1888, s. 39.

The Municipal Boundaries Act, sec. 81, provided that in case a local option by-law was in force in territory changed by such Act, it should continue to effect that territory as though the Act had not been passed ; and by sec. 396 of Mun. Act of 1890 a municipal council may repeal, alter and amend by-laws as therein provided.

Mulock, Q.C., for applicant, contended, *inter alia*, that by.law 64 could not be repealed by present defendants, but only by old municipality of North Dufferin, and as the latter was not now in existence, the by-law would have to stand pending further action of the Legislature.

Munson and *Wade* in reply.

Held—

The defendants had the power to pass by-law 22, repealing by-law 64.

Application dismissed with costs.

The applicant appealed.

Mulock, Q.C., and *Isaac Campbell*, Q. C., for appellant.

Munson and *Wade* for respondents.—There is no jurisdiction to entertain the appeal. The rule, though argued and disposed of before Dubuc, J., was originally issued by

Bain, J., and the judge who granted it is, under sec. 258 of the Municipal Act of 1886, the only one who could hear argument upon it or deal with it in any way (this objection was taken before Dubuc, J.) ; neither the Chief Justice who had adjourned the argument, nor Dubuc, J., who made the rule absolute, had any right to entertain it ; the judge in chambers was *persona designata* by sec. 258 of the Municipal Act, and all proceedings should take place before the judge who granted the rule in the first instance ; this is an appeal from a nullity.

Held—

A fatal objection.

Rule dismissed with costs.

JONES v. SIMPSON.

MAY 25, 1892.] [BAIN, J.

Real Property Act—Caveat and affidavit—Defects in—Insufficient statement of interest in land affected.

Hearing of petition under Real Property Act.

Ewart, Q. C., for petitioner.

Geo. Patterson, Sr., for caveatee, objected to the petition being heard on the ground that the caveat was defective in substance because (1) the addition of the caveator was not set out as required by sec. 143, and (2) the estate or interest that the caveator claimed in the land was not sufficiently described.

The statement of the caveator's estate and interest claimed in the land was only stated in both the caveat and affidavit thus :—"I have an attachment against Thomas Moodie who owns or has a personal interest in the land described." The direction in the form of caveat in the statute requires the caveator to "particularize the estate or interest claimed ;" and the deponent to the affidavit in support of

the caveat is directed to "here state particulars of caveator's interest." It was not even shown that a certificate of the writ of "attachment" (if such it were) had been registered, without which the writ would be inoperative as against the land in question.

Held—

Both of the objections were fatal. The direction of the statute as to the first must be considered imperative, and no equivalent can be accepted: as to the second, "the statement not only fails to give any particulars of the interest that is claimed by the caveator, but it does not even go the length of showing that he has or can have any interest in the land."

Petition dismissed with costs.

REGINA v. WILLIAMS.

MAY 25, 1892.] [BAIN, J.

Liquor Licence Act—Proof of licence—Selling within prohibited hours and without licence—Extent of amendments under act defined.

The defendant was convicted under sec. 67 of Liquor Licence Act for selling liquor during prohibited hours, and was adjudged to pay a fine of $50.00 and costs. The conviction was

"That the said William Williams, on the 21st day of February, in the year, etc., at the village of Crystal City in the County of Rock Lake in his premises in the village aforesaid, being a place where liquor may be sold, unlawfully did sell liquor during the time prohibited by the Liquor Licence Act of 1889, and amended Act for the sale of the same, without any requisition for medical purpose, as required by the said Acts, being produced by the vendee," etc.

In the evidence returned by the justices there was nothing whatever to shew that the defendant held a licence for the premises where the liquor was sold.

Davis for the Crown.

Wade for the defendant.

Held—

1. There could not be a conviction of the offence without proof of the licence.

2. Though section 118 of the Licence Act covers many defects of substance and of form and clothes the court with ample powers in certain instances, yet it does not go the length of enabling it to arbitrarily convict a defendant of an offence for which he was never tried, and the court would not, on this application, find the defendant guilty of selling liquor without a licence, or make such amendments in the conviction as would accomplish that object.

Conviction quashed without costs; usual order for protection of the justices.

ROFF v. KROEKER.

MAY 25, 1892.] [BAIN, J.

Chattel mortgage—"Situation" of goods—Filing in wrong office, effect of—Notice of prior mortgage to agent.

Replevin. One H. mortgaged in the county of Dufferin, on December 9, 1890, a pair of horses then momentarily in said county, but kept at his farm in another county, and the mortgage was registered in the County of Dufferin on April 13, 1891. At the request of the bailiff of the county court of Manchester, charged with the execution of a writ against H. at the suit of the present plaintiff, the said H., on October 17, 1891, mortgaged the same horses, then in said county of Manchester, to the plaintiff, and the mortgage was duly registered in the county of Manchester three days after date. The bailiff knew at the time of the other mortgage, but did not tell the plaintiff, and the allegation of the defendant that he had told the plaintiff of his mortgage before the second was given was denied.

H. having made default, the defendant took possession and the plaintiff replevied on December 24 last.

The act † directs that a mortgage "shall be filed with the clerk of the county court in the judicial division where the said goods and chattels are situated."

Tupper, Q. C., and *Phippen* for plaintiff.

Munson, for defendant, relied mainly on *King* v. *Kuhn*, 4 M. R. 413.

Held—

1. The division in which the horses were situated was that of their owner's residence and domicile at which they were usually kept.

2. The plaintiff was bound by the notice that the bailiff had of the prior chattel mortgage—*Rolland* v. *Hart*, 6 Ch. App. 678; and consequently was not a purchaser in good faith within the meaning of the act; ‡ *King* v. *Kuhn*, *supra*, applies to the case of a mortgage that has not been filed as well as to the case of one which has not been refiled.

Verdict for defendant.

BERTRAND v. PARKES.

JUNE 4, 1892.] [FULL COURT.—TAYLOR, C. J. DUBUC, J. KILLAM, J.

Fraudulent preference—Chattel mortgage—Right of official assignee to file bill—Effect of renewal mortgage—Mortgage to be void must be voluntary.

Appeal by defendant from judgment of Bain, J., *ante* vol 1, pages 85-87, *q.v.* for facts.

Howell, Q.C., and *Crawford* for plaintiff.

Ewart, Q.C., for defendant.

Held—

1. The plaintiff, the official assignee, was entitled to

† Con. Stat. cap. 49, sec. 6; 44 Vic. c. 11, s. LXIV.

‡ 48 Vic. c. 35, s. 1, "as against execution creditors of the mortgagor and as against purchasers and mortgagees in good faith and for valuable consideration."

file the bill herein to have two chattel mortgages declared void, and for other relief.

2. The first chattel mortgage being a good one, and not void because of an agreement not to register, the second, which was merely in substitution or renewal, but duly registered so as to give notice to the official assignee and creditors, was valid as against them, for the first, not having been given with intent to prefer, and being one which might have been registered, the second did not have the effect of giving a preference—*Hollingsworth* v. *White*, 6 L. T. N. S. 604 ; *Smale* v *Burr*, L. R. 8 C. P. 64 ; and *Ramsden* v. *Lupton*, L. R. 9 Q. B. 17.

3. As soon as the fact of an assignment for creditors has been communicated to a creditor, who though he may not execute it, does not repudiate it, a binding irrevocable trust is created which constitutes the trustee a purchaser for value—*McAllister* v. *Forsyth*, 12 S. C. R. 20. A creditor could not, after making an assignment, revoke it even before a meeting of the creditors.

4. A mortgage cannot now be held void as a preference because the mortgagor was insolvent when it was given : in order to render it void as a preference, it must be the result of the pure voluntary act of the debtor—following *Molson's Bank* v. *Halter*, 18 S. C. R., and *Stephens* v. *McArthur*, 19 S. C. R. 446.

Decree reversed ; bill dismissed with costs.

CROTTY v. TAYLOR.

JUNE 4, 1892.] [FULL COURT—TAYLOR, C. J. DUBUC, J. KILLAM, J.

Mortgagor and mortgagee—Pretended sale under power—Effect of—Right to sue for deficiency.

Bill by assignors of a mortgage to have it declared that the defendants, the assignees, have disentitled themselves

to any right to enforce a judgment recovered by them on the covenant in deed of assignment against the assignors because of the actions of the defendants in causing a pretended sale of the property to be held under the power of sale in the mortgage, and having the same bought in by a third party and a series of conveyances procured with the object of cutting out the equity of redemption; and also praying that defendants might be restrained from enforcing the writs of execution under such judgment. Demurrer for want of equity overruled; defendants appealed.

Howell, Q.C., and *Cumberland* for plaintiff.

Ewart, Q.C., for defendants.

Held—

A mortgagee who has exercised a power of sale, and who has thereby realized only part of the amount due, can proceed to enforce payment of any deficiency. He can so proceed against a surety as well as the original debtor because he has only exercised a right which he expressly stipulated for which is conferred upon him by the mortgage, and subject to his right to exercise which the surety took upon himself the obligation of suretyship—*Willes* v. *Levett*, 1 De G. & Sm. 392; *Middleditch* v. *Ellis*, 2 Ex. 623; *Rudge* v. *Richens*, L. R. 8 C. P. 358; *Gordon* v. *Gilfoil*, 99 U. S. 168, and Coote on Mortgages, 724.

2. The exercise of the power of sale *mala fide* or for an improper purpose is a defence to an action on the covenant —*Kelly* v. *Imp. Loan Co.*, 11 S. C. R. 516 distinguished.

3. The defendants having put it out of their power to convey to the plaintiffs upon payment of the mortgage money, and having done this by the exercise of a power of sale which was not *bona fide* but intended to cut out the equity of redemption while still enforcing payment of the debt, the plaintiffs were entitled to the relief prayed.

Order overruling demurrer affirmed with costs.

MERCHANTS BANK v. CARLEY.

JUNE 4, 1892.] [FULL COURT—TAYLOR, C. J. KILLAM, J. BAIN, J.

Judgment debtor—Examination of—Lines to be pursued on inquiring into wife's estate—What is wife's separate employment—Married woman's.

Appeal from judgment of Dubuc, J., confirming order of the Referee refusing a motion to commit for refusal to answer questions on examination as judgment debtor under R. S. M., Cap. 1, s. 64.

Plaintiffs recovered judgment in 1883; that year the defendant assigned and soon after left the Province, but returned in 1889. From the examination it appears that since the return a business has been and now is carried on at a profit under the name of Carey Brothers; defendant's wife and brother being the partners, who, it is claimed, contributed the capital in equal shares, none of it being supplied by defendant. The wife took no part in management except through defendant, who represented her by power of attorney, and received from firm a salary of $20.00 per week.

Tupper, Q.C., and *Phippen* for plaintiffs.

Elliott for defendant.

Held—

After a consideration of the cases of *Dom. Sav. Co.* v. *Kilroy*, 15 App. 487; *Murray* v. *McCallum*, 8 App. 277; *Lovell* v. *Newton*, 4 C. P. D. 7; *Laporte* v. *Costick*, 31 L. T. N. S. 434; *Swanton* v. *Goold*, 9 Ir. C. L. R. 234; *Kraemer* v. *Glass*, 10 C. P. 470; *Re Dearmer*, 53 L. T. N. S. 905; *Harrison* v. *Douglass*, 40 U. C. R. 415; *Campbell* v. *Cole*, 7 O. R. 127; *Monkman* v. *Robinson*, 3, M. R. 640; and *Ross* v. *Van Etten*, 7 M. R. 598, that the proceeds or profits of the business so carried on could not be held to

be free from the debts or disposition of the husband, under sec. 14 of the Mar. Wom. Prop. Act., R. S. M., cap. 95. It was not carried on by her separately from her husband, or in fact at all, as he represented his wife's share and she left her share to his management, and except through him she took no part in the business; consequently the husband was entitled to an interest in the profits and therefore bound to answer such questions as might be put to him respecting the profits derived from the business and their disposal, even if the result might be that he should be compelled to make discovery of matters in which his wife was interested.

Appeal allowed—order that defendant attend at his own expense and submit to be examined as to the profits of the business and how they have been dealt with ; costs allowed of proceedings in chambers and of appeals, and any additional costs occasioned by defendants refusal.

REGINA v. LACOUSIERE.

JUNE 4, 1892.] [FULL COURT—TAYLOR, C. J. KILLAM, J. BAIN, J.

Certiorari—Return to by two only of three justices—Quashing conviction—Abuse of process—Remarks on duty of counsel.

Appeal from order of Dubuc, J., granting certiorari, *ante* p. 38 ; and also application to quash conviction referred by Killam, J., to Full Court to be argued with said appeal.

The appeal having been dismissed on technical grounds (*ante* p. 101) the application to quash alone remained for disposition.

Haggard for the rule nisi.

Mulock, Q.C., *contra*, objected that no proper return had been made to the writ of certiorari, none upon which the

court could act; the conviction was made by three justices and the return to the certiorari and the schedule was signed by two only; the third, who was temporarily absent, had afterwards made a return, but it was on a separate paper and not attached to the writ.

Held—

A return to a writ of certiorari made by one or two of several convicting magistrates, provided they, having the record in their possession, can return it, is a sufficient return upon which the court can act.—*Rex* v. *Griesly*, Comb. 25; *King* v. *Inhabs. of Darlington*, 1 Barnard. 113; 4 Viner's Abrid. 355; *Duke of Norfolk's Case*, 1 Dyer 93; *Reeve* v. *Brown*, 1 Keb. 282; *Reg.* v. *Frawley*, 45 U. C. R. 227; *Re Shotwell*, 10 Johns. (U. S. A.) 304; 12 Ibid. 31; *Seymour* v. *Webster*, 1 Cow. 168 (U.S.A.), and *Paley on Convics.*, 6th ed. 444.

Per TAYLOR, C. J., (in delivering the judgment of the court)—

"The conviction must be quashed. There is no evidence of any felonious intent on the part of Lacousiere in anything he did. On the contrary, it, in my opinion, proves that there was no such intent. I cannot understand how a counsel attending upon a prosecution before three country justices could allow them to convict upon such evidence as was given in this case. Far less can I understand how, after they had decided to convict, he could be a party to the making of the alleged agreement, that the accused should be discharged from the conviction upon returning the bedstead, paying $50 damages and the costs, with an undertaking not to appeal. . . . . I fully endorse what was said by my brother Dubuc (*ante* p. 33) when disposing of the application for the writ of certiorari. The whole proceedings, arrest, trial and conviction were a gross abuse of criminal process for the purpose of obtaining an undue advantage in a most trivial matter. Against the

private prosecutor I have no hesitation in ordering the payment of costs."

Rule to quash made absolute; costs against private prosecutor, the Comte de Leusse.

VELIE v. RUTHERFORD.

JUNE 4, 1892.] [FULL COURT—TAYLOR, C. J. KILLAM, J. BAIN, J.

Married woman—Action against—Separate estate—Requisites of proof of before recovery.

Appeal by plaintiff from judgment of Dubuc, J., reported *ante* p. 78, upholding finding of County Judge, entering verdict for defendant, a married woman.

Elliott for plaintiff.

Kennedy, Q.C., for defendant.

Held—

Per TAYLOR, C. J.:

"If it was intended by the judge of the County Court and by my Brother Dubuc to hold that, in every case, before a judgment can be recovered against a married woman, the existence of separate property must be proved, then I must enter my most respectful dissent. As was pointed out in *Wishart* v. *McManus*, 1 M. R. 213, there are not to be found in our act, nor in any Ontario act, such restrictive words as are found in the English act, that damages and costs recovered in an action against a married woman 'shall be payable out of her separate property and not otherwise.' I do not agree with the views held by a large number of the judges in Ontario, nor with the conclusions arrived at by the Ontario Court of Appeal in *Darling* v. *Rice*, 1 A. R. 43; and *Lawson* v. *Laidlaw*, 3 A. R. 77. In my judgment the opinions on this subject held and expressed by the late Sir Adam Wilson in *Wagner* v. *Jefferson*, 37 U. C. R. 551; and by

Armour, C. J. in *Clarke* v. *Creighton*, 45 U. C. R. 514, and *Griffin* v. *Patterson*, 45 U. C. R. 536, are correct. I adhere to the opinion I expressed in *Wishart* v. *McManus* that debts contracted by a married woman in carrying on a business, or employment, occupation or trade in her own behalf separately from her husband, may be sued for as if she were an unmarried woman, that is, without regard to separate estate. But when suing a married woman it is necessary to prove one of two things: It must be proved that she is carrying on a business or employment, occupation or trade, separate from her husband, and that the liability sued upon arose out of, or was contracted in connection with that separate business or employment, occupation or trade. That is what was proved in *Wishart* v. *McManus*. Or, it must be shown that the married woman is possessed of separate property upon which it may be presumed she intended the liability incurred or contract enetred into, and which is the subject matter of the suit, should attach, or out of which it should be paid.

"In the present case the plaintiff has proved neither of these. The learned judges who have already dealt with the case have found correctly that there is no evidence of the existence of separate property, and I cannot find in the evidence any proof that the defendant was carrying on a busidess or employment, occupation or trade separately from her husband. I therefore arrive at the same conclusion as the learned judge of the County Court and my Brother Dubuc did, that there cannot be a verdict for the plaintiff. The proper order to make wi l be that the verdict for the defendant be set aside and a non-suit entered; but the plaintiff must bear the costs of the present appeal."

Per BAIN, J. "That the plaintiff may not be prevented from trying the case again should he desire to do

so, the verdict for the defendant should be set aside and a non-suit entered. The defendant is entitled to costs."

TAYLOR v. SHARP.

DUBUC, J.

JUNE 4, 1892.] [FULL COURT—KILLAM, J.
BAIN, J.

Petition to set aside sale of mortgaged lands—Fraud on court in obtaining report and vesting order—Parties to petition in such case—Setting aside proceedings for fraud.

A report confirming a sale of lands under a decree, and a vesting order, were obtained by the practice of a fraud upon the court and the defendants, who filed a petition praying a declaration that the sale was void and that the report fixing amount due and writs of execution issued thereunder be set aside.

It was objected on behalf of the plaintiff that the other parties to the cause and the purchaser under the sale and his assigns, had no notice of the application.

TAYLOR, C. J., made an order setting aside the report and the executions, but not directly interfering with the sale.

Plaintiff set the petition down for rehearing.

Ewart, Q.C., for plaintiff—The sale can not be set aside in the absence of these parties, and the subsequent proceedings can not be set aside until revocation of the sale and the report and order confirming it.

Howell, Q.C., and *Cumberland* in reply,

Held—

1. A judgment or decree obtained by fraud is void at the option of the party upon whom the fraud is practised, and this seems equally applicable where the nullity is set up in the same suit—*Regina* v. *Saddler's Co.*, 10 H. L. 404; *Earl Bandon* v. *Becher*, 3 C. 4 & F. 479; *Philipson* v.

Egremont, 6 Q. B. 587 ; and *Harrison* v. *Southampton*, 4 De G. M. & G. 137.

2. It was not necessary to have any order setting aside the sale, or the report confirming it, in order to entitle the petitioners to have the subsequent proceedings set aside.

Order of Chief Justice affirmed with costs.

HARDY v. DESJARLAIS.

KERR v. DESJARLAIS.

JUNE 20, 1892.] [DUBUC, J.

R. P. Act—Half-breed title—Sale of infants' lands under court order—Necessary compliance with order—Lost order, proof of.

Issue under Real Property Act.

Defendant, a half-breed, on attaining his majority in 1890, made application for certificate of title as grantee from Crown of patent dated October 2, 1882, under Manitoba Act.

The plaintiffs filed caveats claiming to be entitled under a Court Order which (under 41 Vic., c. 7, s. 15) on the petition of the defendant, then an infant, presented by his father, directed a sale of said lands and ordered the proceeds to be applied to the maintenance and education of the defendant ; and authorized the father to execute a conveyance on certain conditions. Under such order the father conveyed to the Rev. C. St. Pierre, who conveyed to H., who conveyed to G., who conveyed to plaintiff Kerr, who conveyed a portion thereof to plaintiff Hardy.

The original order was lost and proof, not conclusive, but sufficient, was given to satisfy the court of this fact ; the plaintiffs adduced the following secondary evidence of the order—(1.) The recital in the conveyance under 48 V., cap. 30, s. 2 ; (2.) an office copy under the seal of the court with stamps thereon, cancelled on Aug. 5, 1882 ; (3.) exemplification under seal of court under Reg. Act, R. S.

M., cap. 135, sec 46 ; and (4.) by an office copy from the Registry office, under sections 50, 75 and 76 of said Reg. Act.

Howell, Q. C., and *Mulock*, Q. C., for plaintiffs.

Ewart, Q. C., and *Chaffey*, for defendant.

Held—

A sufficient proof of the making of the order.

The order directed that the sum of $200 offered was a fair price and should be accepted ; that a sale be made to St. Pierre upon payment into court of that sum for the use, etc., of defendant ; that upon such payment the father be empowered to execute a conveyance of said lands ; that the said sum be then paid out to St. Pierre on his entering into and delivering to the Master a bond conditioned for the proper expending of the money so entrusted to him for the maintenance and support of the defendant. The money was paid in by, and paid out to St. Pierre on Sept. 23, 1881, ten months after the date of the order, and after he had sold to H.; but already as early as June 1880, St. Pierre had paid a considerable portion, if not the whole of the purchase money, to the father for the infant.

Held—

That while the payments in and out of Sept. 23, 1881, were certainly against the spirit and intention of the order, even if they were not against the letter, as no time for payment was fixed thereby, yet the terms thereof had been substantially complied with, and the provisions of 48 V., cap. 30, secs. 1 and 2 (reproduced in R. S. M., c. 67, secs. 11 and 22) should be considered as fully applicable—*Barber* v. *Proudfoot*, 1 W. L. T. 147 distinguished as in that case no sale had been made at all, but an improper exchange effected, and the terms of the order had been neither strictly nor substantially observed.

Verdict for plaintiffs.

THE

WESTERN LAW TIMES REPORTS.

EDITOR:

ARCHER MARTIN,

BARRISTER-AT-LAW.

MANITOBA.

IN THE QUEEN'S BENCH.

McCLENEGHAN v. HETHERINGTON.

JUNE 28, 1892.] [DUBUC, J.

Limitation of action on mortgage—R. S. M. c. 89, s. 24 applies to any lands—English doctrine preferred to that of Ontario.

R. S. M. cap. 89, sec. 24 provides:

No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within ten years next after the present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment of the right thereon has been given in writing signed by the person by whom the same is payable or his agent, to the person entitled thereto or his agent; and in such case no action, suit or proceeding shall be brought, but within ten years after such payment or acknowledgment, or the last

of such payments or acknowledgments if more than one was made and given.

Dumurer to a replication raising the question whether the provisions of that section apply to a covenant in a mortgage upon lands without this Province as well as within.

Howell, Q. C., for plaintiff.

McLeod for defendant.

Held—

1. The section applied to any land—following *Sutton* v. *Sutton*, 25 Ch. D. 511—otherwise a foreigner would have a right of action in Manitoba on a covenant in a mortgage upon lands outside the Province, while a Manitoban would be deprived of such right of action on a mortgage upon lands therein.

2. The doctrine of English courts should prevail over that of the Courts of sister Provinces in questions where the law is substantially the same in Imperial and Provincial legislation.

Demurer allowed with costs.

ROTHWELL v. MILNER.

JULY 2, 1892.] [BAIN, J.

Sale of horse—Warranty—Glanders—Caveat emptor.

Appeal by plaintiff from verdict of county judge, who found for defendant in an action brought against him for breach of duty under sec. 16 of the Diseases of Animals Act,† in selling a glandered horse to plaintiff, which, however, he did know to be suffering from that disease (in consequence of which it was destroyed) nor had he "cause

† Now Rev. Stat. sec. 26: "Any person who sells or disposes of . . . any animal infected with or labouring under any infectious or contagious disease, or any animal respecting which there is cause for suspicion that such animal is infected . . . shall for every such offence incur a penalty of one hundred dollars."

for suspicion" at the time of sale that the horse was so infected. There was no warranty express or implied, as to condition of horse at time of sale.

Allan Macdonald for plaintiff.

Colin H. Campbell for defendant.

Held—

1. Even had there been a breach of the statutory duty the action would not lie, in the absence of a specific right created or vested in the plaintiff—Addison on Torts, 74.

2. In the absence of a warranty the maxim of *caveat emptor* should prevail, and the plaintiff should have had the horse examined.

Appeal dismissed with costs.

CHARLEBOIS v. GREAT N. W. C. RY. CO.

Railway Act 278—Right of company to mortgage—General powers in that behalf—Enforcement of decree of Ontario Court uncertain.

JULY 2, 1892.] [BAIN, J.

The plaintiff filed a bill of complaint against the defendants, a railway company incorporated under Dominion act, upon an agreement for the construction of defendants' railway. A clause in the agreement was set out in the bill as follows:

The Contractor (plaintiff) shall have, in addition to such protection and lien (if any) as the law allows and accords him, a full and complete lien and first charge, upon and over the said first fifty miles of railway and its appurtenances including rails, ties, buildings, equipment, road-bed, right-of-way, right to the land grant thereto appertaining, if and when fully earned, right of operation of said railway, and upon the whole property enterprise and undertaking (including the works already in course of completion) until he, the said Contractor, is and shall be paid the said full sum of one hundred and fifty thousand pounds sterling (£150,000) as aforesaid, nor shall the Company be at liberty to take possession of or exercise any acts of possession over or respecting the said fifty miles of railway or its appurtenances afore-mentioned while or so long as any sum remains due and unpaid to the Contractor under this Contract, and the full absolute and sole possession thereof shall in such case remain and be vested meanwhile in the Contractor.

The bill also alleged two judgments obtained by the plaintiff against defendants in Ontario, by which defendant's railway, land grant, etc., in Manitoba were ordered to be sold, and the defendants were ordered to deliver up possession of the said railway, land grant, etc., to the plaintiff and were restrained from retaining possession of the railway and from dealing with the land grant or bonds of the Company.

The bill prayed, *inter alia*, for delivery of possession by the defendants, for an injunction restraining them from alienating or disposing of the railway, land grant, etc., and also for specific performance of the judgments of the Ontario Court, and payment of amount found due by it.

The defendants demurred for want of equity to so much of the bill as asked for such relief.

Howell, Q. C., and *Cumberland* for plaintiff.

Culver, Q.C., and *Bradshaw* for the defendants.

Held—

1. While neither the special act incorporating the defendants, nor the Railway Act, expressly authorized such an agreement, and while in England it seems to be settled that under the acts in force there a railway company cannot mortgage or charge the permanent way or fixed plant or franchise so as to give the mortgagee the right to enter upon the property or otherwise to interfere with the Companys possession—*Gardiner* v. *London C. & D. Railway*, L. R., 2 Ch. 201—and a similar doctrine has been established in Ontario—*Peto* v. *Welland Ry. Co.*, 9 Gr. 458; *Phelps* v. *St. Cath Ry. Co.*, 19 Ont. 501—yet in view of section 278 of the present Railway Act, which recognizes the fact that, as Lord Watson said in *Redfield* v. *Wickham*, 13 App Ca. 467, "a railway or section of a railway, may, as an integer, be taken in execution and sold like other *imeubles* in ordinary course of law," the present policy of Canadian

law in this respect must be considered different from that which formerly obtained in England.

2. Under said sec. 278, only the purchaser at a sale is entitled to operate or have possession of a railway; that section does not apply to the present case.

3. The decision in the case of *Bickford* v. *Grand Junction Ry Co.*, 1 S. C. 696, seems to go the length of holding that the express power to borrow and to give specified securities will not negative or exclude the general power of the company to give other securities for the purposes within the scope of the powers conferred upon it to construct and operate a railway; the present agreement cannot be said to be invalid in so far as regards the giving of a lien, but it does not follow that the plaintiff is entitled to all the relief sought.

4. Though the Ontario Court may have had jurisdicton to make the decree which it did in regard to the railway and land in this Province yet there did not appear to be any authority to the effect that this court should recognize and give effect to the order of the Ontario Court in that respect, following *Norris* v. *Chambers*, 30 L. J. Ch. 285, where it is stated that there is always the difficulty that such a "declaration and decree may be a mere *brutum fulmen* and incapable of being enforced."

5. It did not sufficiently appear that the plaintiff was not entitled to some of the relief prayed, and such being the case the demurrers were too wide and should be over-ruled.

6. The general demurrer to the whole bill for want of equity and for want of parties must be over-ruled, because the plaintiff would be entitled at all events to a decree for the payment of the amount due by the defendants to the plaintiff, and which, by the judgments in the Ontario Court, the defendants were ordered to pay to him personally.

Demurrers over-ruled.

RUDDELL v. GEORGESON.

JULY 11, 1892.] [TAYLOR, C. J.

Patent—Tax Sale—Effect of sale of unpatented lands—Right of Crown to issue patent to original purchaser.

Bill praying for a declaration that one B. holds the legal estate of certain lands as trustee for plaintiff. B. agreed to purchase the lands from the Crown on October 19, 1881, and paid a large proportion of the purchase money. By a series of conveyances his interest in the lands became vested in defendant, who eventually paid the balance of the purchase money to the Crown, and obtained a patent on October 20, 1891. Taxes were assessed and levied on the lands for the years of 1883, '84, '85, and '86, and these being unpaid the lands were sold on July 26, 1887, to the plaintiff, and tax deed duly issued to him on July 28, 1889, in form prescribed by Municipal Act of 1886. Defendant applied for certificate of title under Real Property Act, and plaintiff filed caveat, and later this bill. It was alleged that the money paid by defendant to complete purchase was really that of B., and that he procured the patent to be issued to defendant, believing that thereby the land would be free from taxes and the tax sale, and that the defendant therefore held the land as trustee for B.

The defendant demurred for want of equity.

Howell, Q. C., for plaintiff.

Tupper, Q. C., and *Phippen* for defendant.

Held—

Assuming that the estate or interest of B. or his assignee was subject to taxation, he had only a limited or partial interest, and all that the purchaser at the tax sale could acquire was that estate or interest, so far as the Crown might be willing to recognize or admit, which it has not done here, but has chosen to recognize the assignee of B. and to issue the patent to him; and were it true

that the balance of the purchase money had been really paid by B. it would make no difference; had he never executed any assignment of his interest in the land the Crown might have issued the patent to him notwithstanding the sale for taxes; the rights of the Crown were not in any way affected by the taxation of the estate or interest which he had acquired as purchaser; there being no allegation of imposition, or fraud by B. on the Crown, it was free to recognize such right as the plaintiff acquired under the tax deed, or to disregard it and recognize the defendant as the person entitled to the patent; having done this latter the fact that thereby the defendant is enabled to hold the land free from taxes is no ground for interference.

"Whether the estate or interest of a purchaser or locatee can be subjected to taxation is a question which may require, and which deserves, more consideration than it has yet received, but I do not propose to deal with the matter at present as the demurrer may be disposed of on other (above) grounds."

Demurrer allowed.

FREEHOLD LOAN AND SAV. CO. v. McLEAN.

JULY 11, 1892.] [TAYLOR, C. J.

Petition to vacate decree on account of surprise and discovery of evidence—Due diligence in such case—Opening Master's reference.

Petition presented by plaintiffs to have a decree vacated and for leave to amend their bill on the grounds of (1) being taken by surprise in the Master's office and (2) subsequent discovery of an important letter in their solicitor's office, nearly four months after date of Master's report.

Mulock, Q. C., for petitioner.

Bradshaw in reply.

The learned judge held on the evidence that there had been no surprise.

As to the discovery of evidence it appeared that the letter in question had been drawn up by and given to one of the firm of plaintiff's agents, who afterwards went to live elsewhere; that on the institution of proceedings all papers had been given to their solicitors; that the letter had by some means unknown got into a wrong envelope with other papers, and though its existence was known to the other member of the firm of plaintiffs' agents, yet he had forgotten it until he drew it forth from said envelope when going through the papers with the company's solicitors who had been unaware of its existence.

Held—

Materiality of the evidence is not sufficient; it must be accompanied by evidence of previous diligence—Graham and Waterman, vol. 1, p. 462—and there was nothing to show that the evidence in question here could not with due diligence have been discovered earlier—*Murray* v. *Can. Cen. Ry.*, 7 A. R. 646.

In any case the evidence here tendered was merely corroborative which, it is well settled, is no ground for granting a new trial—*Miller* v. *Confed. Life*, 11 O. R. 120; 14 A. R. 218; and the Master's reference having been closed it should not be opened except under such a state of facts as would warrant a new trial being granted.

Petition dismissed with costs.

THE

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EDITOR:

ARCHER MARTIN,

BARRISTER-AT-LAW.

IN THE PRIVY COUNCIL.

CITY OF WINNIPEG v. BARRETT.
CITY OF WINNIPEG v. LOGAN.

JULY 30TH, 1892.]

JUDICIAL COMMITTEE—LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD HANNEN, LORD SHAND, SIR RICH. COUCH.

Constitutional law — The Manitoba and B. N. A. Acts — Denominational schools in Manitoba—Right of Roman Catholic or English Church thereto—Manitoba Schools Act of 1890.

1. The Manitoba Public Schools Act of 1890, 53 Vic. cap. 29, is *intra vires* of the Legislature of that Province.

2. The provisions of subsections 2 and 3 of section 22 of the Manitoba Act do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.

3. The establishment of a national system of education upon an unsectarian basis is not so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other.

4. There were no rights or privileges with respect to denominational schools existing by law or practice in Manitoba at the time of the Union with Canada which were prejudicially affected by said Public Schools Act.

5. The schools established by said Act are not Protestant schools but

unsectarian schools, and no right or privilege of any denomination is prejudicially affected by the fact that, owing to religious convictions, its members feel compelled to support their own separate schools, and find themselves unable to partake of the advantages of the public unsectarian schools for which they are taxed in common with other denominations.

6. The word "practice" in subsection 1 of section 22 of the Manitoba Act is not to be construed as equivalent to "custom having the force of law."

The Manitoba Act, sec. 22, provides:

In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:

(1) Nothing in any such law shall prejudically affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union.

(2) An appeal shall lie to the Governor-General in Council from any act or decision of the legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

(3) In case any such Provincial law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General in Council on any appeal under the section is not duly executed by the proper Provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

The British N. Am. Act, sec. 93, provides:

(1) Nothing in any such law shall prejudically affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the union. . . .

By the "Act respecting the Public Schools" and the "Act respecting the Department of Education," both assented to on March 31, 1890, the Legislature of Manitoba purported to abolish the system of Separate Schools for Protestants and Roman Catholics, which at that time was in existence in said Province, and established instead a system under which the public schools were organized in all the school districts without regard to the religious views of the ratepayers.

The City of Winnipeg on July 14, 1890, passed a by-law, No. 480, to authorize an assessment for city and school purposes in that city for the current municipal year. On July 28 another by-law, No. 483, was passed amending the former by-law.

On October 7, 1890, one John Kelly Barrett, a Roman Catholic ratepayer of said city, obtained, under Munic. Act, 53 V., c. 51, s. 258, a summous for an order to quash said by-laws "for illegality, and that upon the following among other grounds.

1. That because by the said by-laws the amounts to be levied for school purposes for the Protestant and Catholic schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum."

No other ground was stated.

On November 24, 1890, the Hon. Mr. Justice Killam delivered judgment in the matter and made an order dismissing the summons with costs.—1 W. L. T. 157.

The applicant appealed to the Full Court of Queen's Bench for Manitoba from the judgment of Killam, J. and on February 2, 1891, the last mentioned Court, (Taylor C. J., Dubuc and Bain JJ.,) gave judgment dismissing the appeal with costs, Dubuc, J. dissenting.—1 W. L. T. 195.

Barrett thereupon appealed to the Supreme Court of Canada, which on October 28, 1891, gave judgment unanimously in his favour, over-ruling the judgments of the Manitoba Courts.—2 W. L. T. 119.

Shortly thereafter the respondent Logan, a member of the Church of England, and a ratepayer, made application to quash by-law No. 514, of the city of Winnipeg for levying and raising the assessment for the year 1891, on the grounds "(1) That by the said by-law the amount estimated to be levied for school expenditure is levied upon members of the Church of England and all other religious denominations alike. (2) That it is illegal to assess mem-

bers of the Church of England for the support of schools which are not under the control of the Church of England and in which there are not taught religious exercises prescribed by said church."

The affidavit filed in support of the application alleged that at the time of the union with Canada of what is now the province of Manitoba, there were in operation a number of parochial schools, in which the distinctive principles and doctrines of the Church of England were taught and which were supported by members of that church, and out of the funds of the church.

The Full Court of Queen's Bench for Manitoba on December 14 last, gave judgment in the applicant's favour, following the Supreme Court's decision in *Barrett* v. *Winnipeg*, *supra*, and holding that the members of the Church of England in Manitoba had the same right to denominational schools as the Roman Catholics.—3 W. L. T. 11.

The City of Winnipeg appealed from the judgment of the Supreme Court in the first case and from the judgment of the Court of Queen's Bench, founded on that of the Supreme Court, in the second.

The appeals were argued * before the above members of the Committee.

Sir Horace Davey, Q. C., *D'Alton McCarthy*, Q. C. (Canadian Bar) and *Joseph Martin*, (Canadian Bar) for the appellants.

The Attorney General, *S. H. Blake*, Q. C., (Canadian Bar) *J. S. Ewart*, Q. C., (Canadian Bar) and *F. C. Gore* for respondent Barrett.

Ram for respondent Logan.

The facts, other than those above stated, sufficiently appear in the

Judgment (delivered by Lord Macnaghten)—

* On July 12-15.

These two appeals were heard together. In the one case the City of Winnipeg appeals from a judgment of the Supreme Court of Canada, reversing a judgment of the Court of Queen's Bench for Manitoba, and in the other from a subsequent judgment of the Court of Queen's Bench for Manitoba, following the judgment of the Supreme Court. The judgments under appeal quashed certain by-laws of the City of Winnipeg, which authorized assessments for school purposes in pursuance of the Public Schools Act, 1890, a statute of Manitoba to which Roman Catholics and members of the Church of England alike take exception. The views of the Roman Catholic Church were maintained by Mr. Barrett, the case of the Church of England was put forward by Mr. Logan. Mr. Logan was content to rely on the arguments advanced on behalf of Mr. Barrett, while Mr. Barrett's advisers were not prepared to make common cause with Mr. Logan, and naturally would have been better pleased to stand alone. The controversy which has given rise to the present litigation is, no doubt, beset with difficulties. The result of the controversy is of serious moment to the province of Manitoba, and a matter apparently of deep interest throughout the Dominion. But in its legal aspect the question lies in a very narrow compass. The duty of this board is simply to determine as a matter of law whether, according to the true construction of the Manitoba Act, 1870, having regard to the state of things which existed in Manitoba at the time of the Union, the Provincial Legislature has or has not exceeded its powers in passing the Public Schools Act, 1890. Manitoba became one of the provinces of the Dominion of Canada under the Manitoba Act, 1870, which was afterwards confirmed by an Imperial Statute, known as the British North America Act, 1871. Before the Union it was not an independent province, with a Constitution and a Legislature of its own. It formed part of the vast terri-

tories which belonged to the Hudson's Bay Company and were administered by their officers and agents. The Manitoba Act, 1870, declared that the provisions of the British North America Act, 1867, with certain exceptions not material to the present question, should be applicable to the province of Manitoba, as if Manitoba had been one of the provinces originally united by the Act. It established a Legislature for Manitoba, consisting of a Legislative Council and a Legislative Assembly, and proceeded, in section 22, to re-enact with some modifications, the provisions with regard to education which are to be found in section 93 of the British North America Act, 1867. Section 22 of the Manitoba Act, so far as it is material, is in the following terms:

> In and for the province the said Legislature may exclusively make laws in relation to education subject and according to the following provisions:
>
> (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the Union.

Then follow two other subsections. Subsection 2 gives an "appeal," as it is termed in the Act, to the Governor-General-in-Council from any act or decision of the Legislature of the province or any provincial authority "affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." Subsection 3 reserves certain limited powers to the Dominion Parliament in the event of the Provincial Legislature failing to comply with the requirements of the section or the decision of the Governor-General in Council. At the commencement of the argument a doubt was suggested as to the competency of the present appeal in consequence of the so called appeal to the Governor-General-in-Council provided by the act. But their Lordships are satisfied that the provisions of subsections 2 and 3 do not operate to withdraw such a question as that involved in the present case

from the jurisdiction of the ordinary tribunals of the country. Subsections 1, 2 and 3 of section 22 of the Manitoba Act, 1870, differ but slightly from the corresponding subsections of section 93 of the British North America Act, 1867. The only important difference is that in the Manitoba Act, in subsection 1, the words "by law" are followed by the words "or practice," which do not occur in the corresponding passage in the British North America Act, 1867. These words were no doubt introduced to meet the special case of a country which had not as yet enjoyed the security of laws properly so called. It is not perhaps very easy to define precisely the meaning of such an expression as "having a right or privilege by practice." But the object of the enactment is tolerably clear. Evidently the word "practice" is not to be construed as equivalent to "custom having the force of law." Their Lordships are convinced that it must have been the intention of the Legislature to preserve every legal right or privilege, and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools which any class of persons practically enjoyed at the time of the Union. What, then, was the state of things when Manitoba was admitted to the Union? On this point there is no dispute. It is agreed that there was no law, or regulation, or ordinance, with respect to education in force at that time. There were, therefore, no rights or privileges with respect to denominational schools existing by law. The practice which prevailed in Manitoba before the Union is also a matter on which all parties are agreed. The statement on the subject by Archbishop Tache, the Roman Catholic Archbishop of St. Boniface, who has given evidence in Barrett's case, has been accepted as accurate and complete. "There existed," he says, "in the territory now constituting the Province of Manitoba a number of effective schools for children. These schools were denom-

inational schools, some of them being regulated and controlled by the Roman Catholic church, and others by various Protestant denominations. The means necessary for the support of Roman Catholic schools were supplied, to some extent, by school fees, paid by some of the parents of the children who attended the schools, and the rest were paid out of the funds of the church contributed by its members. During the period referred to Roman Catholics had no interest in, or control over, the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in, or control over, the schools of the Roman Catholics. There were no public schools in the sense of State schools. The members of the Roman Catholic Church supported the schools of their own church for the benefit of the Roman Catholic children, and were not under obligation to and did not contribute to the support of any other schools." Now, if the state of things which the Archbishop describes as existing before the Union had been a system established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by schools fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body, which was engaged in a similiar work at the time of the Union would have had precisely the same right with respect to their denominational schools. Possibly this right if it had been defined or recognized by positive enactment, might have had attached to it, as a necessary or appropriate incident, the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their lordships opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so incon-

sistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other. It has been objected that if the rights of Roman Catholics, and of other religious bodies, in respect to their denominational schools, are to be so strictly measured and limited by the practice which actually prevailed at the time of the Union, they will be reduced to the condition of a "natural right" which "does not want any legislation to protect it." Such a right, it was said, cannot be called a privilege in any proper sense of the word. If that be so, the only result is that the protection which the Act purports to extend to rights and privileges existing "by practice" has no more operation than the protection which it purports to afford to rights and privileges existing "by law." It can hardly be contended that in order to give a substantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the court to discover privileges which are not apparent of themselves, or to ascribe distinctive and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection. Manitoba having been constituted a province of the Dominion in 1870, the Provincial Legislature lost no time in dealing with the question of education. In 1871 a law was passed which established a system of denominational education in the common schools as they were then called. A board of education was formed, which was to be divided into two sections, Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Under the Manitoba Act the province had been divided into twenty-four electoral divisions for the purpose of electing members to serve in the Legislative Assembly. By the Act of 1871, each electoral

division was constituted a school district, in the first instance. Twelve electoral divisions, "comprising mainly a Protestant population," were to be considered Protestant school districts; twelve, "comprising mainly a Roman Catholic population," were to be considered Roman Catholic school districts. Without the special sanction of the section there was not to be more than one school in any school district. The male inhabitants of each school district, assembled at an annual meeting, were to decide in what manner they should raise their contributions towards the support of the schools, in addition to what was derived from public funds. It is perhaps not out of place to observe that one of the modes prescribed was "assessment on the property of the school district," which must have involved, in some cases at any rate, an assessment on Roman Catholics for the support of a Protestant school, and the assessment on Protestants for the support of a Roman Catholic school. In the event of an assessment there was no provision for exemption, except in the case of a father or guardian of a school child, a Protestant in a Roman Catholic school district, or a Roman Catholic in a Protestant school district—who might escape by sending the child to the school of the nearest district of the other section and contributing to it an amount equal to what he would have paid if he belonged to that district. The laws relating to education were modified from time to time, but the system of denominational education was maintained in full vigor until 1890. An act passed in 1881, following an act of 1875, provided among other things that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and a Roman Catholic district might include the same territory in whole or in part. From the year 1876 until 1890 enactments were in force declaring that in no case

should a Protestant ratepayer be obliged to pay for a Roman Catholic school or a Roman Catholic ratepayer for a Protestant school. In 1890 the policy of the past 19 years was reversed, and the denominational system of public education was entirely swept away. Two acts in relation to education were passed. The first (53 Vict. c. 37) established a Department of Education and a Board consisting of seven members known as the "Advisory Board." Four members of the Board were to be appointed by the Department of Education, two were to be elected by the public and high school teachers, and the seventh member was to be appointed by the University Council. One of the powers of the Advisory Board was to prescribe the forms of religious exercises to be used in the schools. The Public Schools Act 1890 (53 Vict. c. 38) enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the act, and that all the public schools should be free schools. The provisions of the act with regard to religious exercises are as follows:

6. Religious exercises in the public schools shall be conducted according to the regulations of the Advisory Board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before any religious exercises take place.

7. Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and, upon receiving written authority from the trustees, it shall be the duty of the teachers to hold such religious exercises.

8. The public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided.

The act then provides for the formation, alteration and union of the school districts, for the election of the school trustees, and for levying a rate on the taxable property in each school district for school purposes. In cities the municipal council is required to levy and collect upon the taxable property within the municipality such sums as the school trustees may require for school purposes. A portion

of the legislative grant for educational purposes is allotted to public schools; but it is provided that any school not conducted according to all the provisions of the act, or any act in force for the time being, or the regulations of the Department of Education, or the Advisory Board shall not be deemed a public school within the meaning of the law and shall not participate in the legislative grant. Section 141 provides that no teacher shall use or permit to be used as text books any books except such as are authorized by the Advisory Board and that no portion of the legislative grant shall be paid to any school in which unauthorized books are used. Then there are two sections (178 and 179) which call for a passing notice, because, owing apparently to some misapprehension, they are spoken of in one of the judgments under appeal as if their effect was to confiscate Roman Catholic property. They apply to cases where the same territory was covered by a Protestant school district and by a Roman Catholic school district. In such a case Roman Catholics were really placed in a better position than Protestants. Certain exemptions were to be made in their favour if the assets of their district exceeded its liabilities, or if the liabilities of the Protestant school district exceeded its assets. But no corresponding exemptions were to be made in the case of Protestants. Such being the main provisions of the Public Schools Act, 1890, their Lordships have to determine whether that act prejudicially affects any right or privilege with respect to denominal schools which any class of persons had by law or practice in the province at the Union. Notwithstanding the Public Schools Act, 1890, Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the Province; they are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their own religious tenets without molestation

or interference. No child is compelled to attend a public school, No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who attend. But then it is said that is is impossible for Roman Catholics or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert's Land, who has given evidence in Logan's case) to send their children to public schools where the education is not superintended and directed by the authorities of their church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault; it is owing to religious convictions, which everybody must respect, and to the teaching of their church, that Roman Catholics and members of the Church of England find themselves unable to partake of the advantages which the law offers to all alike. Their Lordships are sensible of the weight which must attach to the unamious decision of the Supreme Court. They have anxiously considered the able and elaborate judgments by which that decision has been supported. But they are unable to agree with the opinion which the learned judges of the Supreme Court have expressed as to the rights and privileges of Roman Catholics in Manitoba at the time of the Union. They doubt whether it is permissible to refer to the course of legislation between 1871 and 1890, as a means of throwing light on the previous practice or on the construction of the saving clause in the Manitoba Act. They cannot assent to the view, which seems to be indicated by one of the members of the Supreme Court, that public

schools under the Act of 1890, are in reality Protestant schools. The Legislature has declared in so many words that the public schools shall be entirely unsectarian, and that is carried out throughout the act. With the policy of the act of 1890 their Lordships are not concerned, but they cannot help observing that, if the views of the respondents were to prevail, it would be extremely difficult for the Provincial Legislature, which has been entrusted with the exclusive powers of making laws relating to education, to provide for the educational wants of the more sparsely inhabited districts of a country almost as large as Great Britain, and that the powers of the Legislature which on the face of the act appear so large, would be limited to the useful but somewhat humble office of making regulations for the sanitary condition of school houses, imposing rates for the support of denominational schools, enforcing the compulsory attendance of scholars, and matters of that sort. In the result their Lordships will humbly advise Her Majesty that these appeals ought to be allowed, with costs. In the *City of Winnipeg* v. *Barrett*, it will be proper to reverse the order of the Supreme Court with costs, and to restore the judgment of the Court of Queen's Bench for Manitoba. In the *City of Winnipeg* v. *Logan*, the order will be to reverse the judgment of the Court of Queen's Bench and to dismiss Mr. Logan's application and discharge the rule nisi and the rule absolute with costs.

Solicitors for the appellants : *Freshfield & Williams.*

Solicitors for respondent Barrett : *Bompas, Bischoff & Co.*

Solicitors for respondent Logan : *Harrison & Powell.*

MANITOBA.

IN THE QUEEN'S BENCH.

SUTHERLAND v. MANNIX.

JULY 20, 1892.] [BAIN, J.

Act respecting lien notes—Construction of sec. 2 thereof.

Appeal by plaintiff from verdict entered by county judge of Rockwood, who held that the Act Respecting Lien Notes, Rev. Stat., cap. 87, s. 2, makes all notes and hire-receipts therein referred to void as against purchasers in good faith, except those taken for manufactured goods having the manufacturers', or some other distinguishing name, imprinted upon them.

C. P. Wilson for plaintiff.

Bonnar for defendant.

Held—

1. Such a construction of the section was open to doubt.

2. The section applies to notes, etc., where the condition of the bailment is such that the possession of the chattel should pass without any ownership being acquired; in the present case the right of property and the right of possession shall both remain in the vendor or holder of the note; consequently the note in question does not come within the terms of the section.

Appeal allowed. Verdict for defendant set aside and one entered for plaintiff with costs.

SCHULTZ v. FRANK.

JULY 22, 1892.] [FULL COURT—DUBUC, J. KILLAM, J. BAIN, J.

R. P. Act—Petition by married woman—Next friend—Separate estate—Rules of procedure—Right to present second petition.

Petition under Real Property Act.

Appeal from order of Chief Justice dismissing petition because of neglect to appoint next friend to plaintiff, a married woman, within specified time.

Elliott for petitioner, caveator.

Ewart, Q.C., for caveatee.

The allegation of title in petition was: "Under and by virtue of a certificate of title issued to the caveator under the provisions of the Real Property Act of 1885, the caveator claims to be entitled to an estate in fee simple in the above mentioned lands and to be the owner thereof."

Held—

Under R. S. M., cap. 95, ss. 29-34, a married woman may sue as a *femme sole*, without a next friend, as regards property made her separate estate by statute, but the above allegation was not one from which the Court could draw the inference that the petitioner sued in that capacity, and if she did, it should have clearly so appeared on the face of the petition.

Quaere, whether the above sections extend to property held to her separate use apart from the statute?

2. Sec. 2 of the R. P. Act does not mean that the court is to apply to other proceedings the practice respecting actions as a whole, but to each kind of proceeding the practice affecting a proceeding of a similar nature in court; the rules of procedure and practice to apply to the present proceeding would be those relating to petitions on the equity side of the court.

3. It would be competent for a judge upon the hearing, or adjournment of the hearing, if the proper material were before him, to order the amendment by the insertion of the name of a particular next friend without summons, but only after a proper adjournment to enable the respondent to make enquiries.

4. The dismissal of a petition as being filed by a married woman without a next friend, would probably not bar a second petition, provided the statute permits of one—no expression of opinion on this point.

Application dismissed with costs, DUBUC, J., dissenting, being of opinion that proceedings should be stayed for a week to allow caveator to file new petition.

ROFF v. KROEKER.

JULY 22, 1892.] [FULL COURT—TAYLOR, C.J. DUBUC, J. KILLAM, J.

Chattel mortgage—"Situation" of goods—Filing in wrong office a nullity—Effect of notice—King v. Kuhn, 4 M. R. 413 over-ruled—Difference between mortgages and bills of sale.

Appeal by plaintiff from judgment of Bain J. reported *ante* pages 127-8, which see for facts.

Tupper, Q.C., and *Phippen* for plaintiff.

Haggart for defendant.

Held—

1. The finding of the court below that the horses were "situated" in the division in which their owner resided and had his domicile should be upheld.

2. The plaintiff, being a mortgagee in good faith for valuable consideration, and the security having been given for a proper and lawful purpose—to secure payment of a judgment—and their being an absence of collusion, was undoubtedly within the rulings of *Moffat* v. *Coulson*, 19 U.

C. R. 341 and *Vane* v. *Vane*, L. R. 8 Ch. 399, and his having had notice of the prior unfiled chattel mortgage was not material—over-ruling *King* v. *Kuhn*, 4 M. R. 413.*

3. Since the amendments of 1885 there have arisen the following cases (1) that of chattel mortgages which from the time of filing operate and take effect against subsequent mortgagees in good faith for valuable consideration, and (2) that of bills of sale, which require to be filed, otherwise the sale shall be absolutely void against subsequent purchasers and mortgagees in good faith for valuable consideration without actual notice.

Verdict for defendant set aside, and one entered for plaintiff, but without costs of motion in term.

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* Decided June 26, 1887; unanimous judgment of Full Court, delivered by Wallbridge, C. J., with Taylor and Killam, J J., concurring.

THE

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EDITOR:

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MANITOBA.

IN THE QUEEN'S BENCH.

MANITOBA & N. W. LOAN Co. v. BARKER.

JULY 5, 1892.] [TAYLOR, C. J.

Mortgage covenant—Rate of interest thereon after due date of principal.

Action on a covenant in mortgage to recover balance claimed to be due after the land mortgaged had been sold under power of sale.

The mortgage was dated Feb. 24, 1883, for $1,400, with interest at ten per cent. and compound interest, payable on July 1, 1888, and interest half yearly on so much principal as should from time to time remain unpaid. There was also a proviso :

That in case default shall be made in payment of any sum to become due for interest at any time appointed for payment thereof as aforesaid, compound interest shall be payable, and the sum in arrear for interest from time to time shall bear interest at the same rate as the principal

money secured by these presents, and in case the interest and compound interest are not paid in six months from the time of the default a rest shall be made and compound interest shall be payable on the aggregate amount then due and so on from time to time and all such interest and compound interest shall be a charge on that land.

Aikins, Q.C. for plaintiff.

Munson for defendant—Since the principal became due interest is chargeable at six per cent. only

Held—

That contention was correct—*St. John* v. *Rykert*, 10 S. C. R. 278 ; *People's Loan Co.* v. *Grant*, 18 S. C. R. 262, and *Powell* v. *Peck* 12 Ont. and 15 A. R. 138, followed.

Verdict accordingly.

GRAHAM v HAMILTON.

AUGUST 4, 1892] [KILLAM, J.

Real Property Act—Dismissal of petition for want of prosecution—Married woman—Next friend—Separate estate—Effect of secs. 2 & 3 of Married Womens' Act.

Motion by married women to dismiss petition under Real Property Act for want of prosecution as required by R. S. M. c. 133, sch. R., rule 13.

Culver, Q.C., for the motion.

C. P. Wilson, for petitioner Graham, objected that as a married woman the applicant could not move without a next friend, and further, that at this stage there could not be a dismissal.

Held—

1. The affidavit of the applicant not showing that the property in question was her separate estate she should have had a next friend appointed.

2. There cannot, in the first instance, be a dismissal of a petition for want of prosecution (in this instance, service) for under rule 16 the only order that can be made is to give time to serve ; rule 16 was added in 1890, while rule

13 is from the act of 1889, which makes it more clear that rule 16 in effect modifies it.

Quaere—Whether the provisions of sec. 2 and 3 of R. S. M. c. 95, Married Womens' Act, apply to acquisitions by purchase ?

Application directed to stand over to enable applicant to have next friend appointed ; but costs of enlargement to be borne by applicant. Should petitioner waive objection, an order may be made at once extending time for service without costs, and, in default, for dismissal.

RE METHODIST CHURCH, MANITOU.

AUGUST 18, 1892] [TAYLOR, C. J.

Church lands—Sale of—Application by trustees for sanction of Judge of Queen's Bench—Notice to congregation of such application necessary.

A lot of land held by trustees for the use of the Methodist Church, Manitou, was sold under the provision of R.S. M., c. 20 s. 14, and an application was made under section 16, to have the execution of a deed to the purchaser sanctioned by a judge of the court of Queen's Bench.

Cameron, for the trustees, read affidavits proving that the land was held by the trustees for the use of the congregation, that it had become unnecessary to be retained for such use, that the sale had been duly advertised according to the requirements of section 14, that the auction was conducted in a fair open manner, that the price realized was a fair one and that the congregation had been duly notified of the sale.

Judgment—

Section 16, under which this application is made, is a copy of Con. Stat. U. C. c. 69, s. 10. The construction put upon that act by the Court of Chancery was, that the congregation should be notified not only of the fact that

a sale had been made, but also of the time at which the court would be applied to to sanction the execution of the deed. It was considered that the statute intended to provide a simple and inexpensive method by which any member of the congregation objecting to the sale could be heard. That seems a reasonable view. Here, notice has been given to the congregation of the fact of the sale, but not of the present application. In every other respect the evidence seems satisfactory and the proceedings regular. The application may stand over until the next day on which a judge will be setting in chambers, and notice may in the meantime be given the congregation that on that day a judge will be applied to for his sanction to the execution of the deed.

HALL v. MUNICIPALITY OF SOUTH NORFOLK.

SEPTEMBER 8, 1892] [KILLAM, J.

Liquor Licence Act—Local Option—Quashing by-law—Nearest newspaper—Publication of notice—"Time and place"—"Village"—Constitutionality of act.

Application to quash by-law of municipality forbidding the receiving by the municipality of any money for a license for the sale of liquors—usually known as a "local option" by-law.

Wade and *Whealler* for the applicant urged, *inter alia*, the following objections to the validity of the by-law :

3. That the notice of the proposed by-law (required by R. S. M. c. 90, s. 63) did not state the time and place fixed for the further consideration of the by-law after the taking of the vote.

4. That the said notice was not published in the said municipality or in a newspaper published nearest to the said municipality.

5. That the said notice was not published for one month before the vote of the electors was taken on the said by-law. . . . .

8. That the provisions of the Liquor Licence Act, 1889, and amendments thereto giving power to municipalities to pass local option by-laws are *ultra vires* of the Provincial Legislature.

Colin H. Campbell for the municipality.

H. A. MacLean for the Attorney-General.

In regard to the 4th objection it appeared from an affidavit of the applicant that by measurement upon the map the boundaries of the Village of Carberry were nearer to the boundaries of the municipality than were those of the town of Portage la Prairie in which the notice had been published, and that at the time there was a suitable newspaper in Carberry in which the notice might have been published ; in reply to which the clerk of the municipality filed an affidavit to the effect that the Portage la Prairie paper was "the paper published nearest to said municipality."

Held—

1. That it was not sufficiently established that the newspaper in which the notice was published was not that published nearest to the municipality ; the particular town or village in which it was published is unimportant and it is not a question of the distance from such town or village to the municipality, but of the distance of the actual place of publication therefrom.

2. The third objection was fatal, the notice not stating the time of day ; also a more particular place should be designated than "the Village of Treherne" which must be taken *prima facie* to designate a locality within the area of which several buildings are found and several persons reside.

3. The fifth objection was fatal ; the provisions of the R. S. M. c. 90, s. 63, reqnire that the notice be "published for at least one month before the vote is taken, but no more than one insertion each week shall be necessary." The vote was taken on May 10, 1892, and the notice was published on the 6th, 13th, 20th, 23rd, 27th and 30th of April ; month meaning calendar month, it must be taken as beginning on the 6th April and ending the 5th May, and

there should have been another publication on the 4th of May.—See *Coe* v. *Township of Pickering*, 24 U.C.R., 439; *In re Miles and Township of Richmond*, 28 U. C. R., 333; *In re Mace and County of Frontenac*, 42 U. C. R., 70; and *Brophy* v. *The Village of Gananoque*, 26 U. C. C. P., 290. . . . "The only safe course is to act on the supposition that the Legislature meant what it said when it prescribed the method of procedure and to hold the by-law invalid if the method has not been followed."

4. The 8th objection "raises a constitutional question of great difficulty and importance. I deem it best always to act on the supposition in such a case that the Legislature has the authority which it assumes to exercise. Of course under our system the responsibility is frequently thrown on the courts to determine how far the Legislature is justified in an assumption of legislative power, and if the other grounds had seemed to be unfounded I should have been obliged in this instance to do so, but for the reasons I have stated I have taken up the questions as to the notice first and I now express no opinion upon the constitutional question."

Order quashing by-law with costs.

THE

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MANITOBA.

IN THE QUEEN'S BENCH.

RE ST. BONIFACE ELECTION.

OCTOBER 10, 1892.] [TAYLOR, C.J.

Election petition—Preliminary objections—Service of.

Summons for hearing of preliminary objections on election petition.

Hagel, Q.C., for petitioner.

Howell, Q.C., for respondent.

Judgment—

The objection raised by the petitioner that the preliminary objections taken by the respondent have not been served cannot be considered upon the material before me. The statute in sec. 37 provides that when such objections are filed the respondent shall at the same time file a copy for the petitioner. This provision seems to have been

complied with. Rule 14 relates to the same subject of filing preliminary objections and after dealing with that says: "and shall serve a copy thereof." How that service is to be effected is not said. It may be, though I scarcely think so, that the filing a copy for the petitioner is the service intended, still it does seem strange that a copy should be left for him and he should also be served with one. That is, however, the case with the petition. But the rule goes on to provide for a summons being taken out to dispose of the objection. Such a summons has been issued here at the instance of the respondent, and I think it should, at all events in the absence of all evidence to the contrary, be assumed that the judge who issued the summons was satisfied with the regularity of the respondent's proceedings up to that time. The objection is taken that the objections have not been served, but there is nothing to support it. There is no affidavit denying the fact of same. Under these circumstances I think I should over-rule the objection and allow the consideration of the preliminary objections to be proceeded with.

IMPERIAL BANK v. SMITH AND KAIN.

OCTOBER 11, 1892.] [IN CHAMBERS—DUBUC, J.

Examination of judgment debtor—Jurisdiction of county judge to order—"Action"—Form of order as to examining partners as to individual estate—Refusal to answer questions—Liberal construction of statute to effect complete discovery.

Summons to commit defendant Kain for refusal to answer questions under an order for the examination of both defendants as judgment debtors. The order was made by Walker, County J., under R.S.M. c. 36, s. 65.

C. H. Campbell for defendant Kain.—The county court judge has no jurisdiction to make the order; said sec. 65, permits him to hear "applications to examine any

party or any of the officers present or past of any body corporate, party to an action, under any statute of the Province," but a judgment debtor is not a party to an action as contemplated by the statute; as to meaning of "action" see *Wharton's Law Lexicon* and *Stroud's Judicial Dictionary.*

Hull (*Aikins, Culver & Hamilton*), in reply.

Held—

According to the modern definition and understanding "action," as above given, is wide enough to include proceedings taken after judgment and leading up to execution or other mode of obtaining satisfaction, as the examination in question—*Howell* v. *Bowers*, 2 Cr. M. & R., 621—and the county judge had authority to make the order.

It was further objected that by the strict wording of the order, the defendants were to be examined only as to their former joint property—"touching their estate and effects" —and not as to their individual estate and effects.

Held—

The objection could not be sustained; there was nothing in the order to shew that the defendants have or had any partnership or firm property, or that such was meant by the order. "Touching their estate and effects," means their individual property as well as their firm assets, if there be any. The questions asked were objected to on mere technical grounds; the statute should not receive the strictest or narrowest literal construction in cases where such construction would only result in defeating the ends of justice.

Order to go in usual form.

RE CONFEDERATION LIFE ASSOC. AND BEALL.

OCTOBER 17, 1892.] [TAYLOR, C.J.

Real Property Act—Decision of District Registrar—Appeal from—Legacy to infants after payment of debts—Priority of and charge for maintenance over subsequent mortage—Conveyance by devisee.

Real Property Act. Appeal from the decision of the District Registrar of Winnipeg.

William Beall the owner of the lands in question in this matter, on 12 July, 1881, mortgaged the same to the Confederation Life Association; in May, 1882, he died; by his will he left his daughter a legacy of $5,000, to be paid to her at the age of 21, after payment of the debts and funeral expenses; the rest of his estate he left to his wife, appointing her and another as executors and directing them to educate and provide all necessaries for his infant child until she became 21, over and above the legacy of $5000. The widow subsequently, in Sept. 1882, executed a further mortgage to the Confederation Life for securing repayment of $2000 then borrowed by her. The co-executor died in Sept. 1883. In a suit for the foreclosure of the second mortgage a decree was made declaring that the legacy to the daughter was a charge on the lands in priority to the mortgage given by the widow, the executrix. A final order of foreclosure was taken out in 1891. Subsequently a suit was instituted by the infant for the redemption of the first mortgage executed by the testator and the same was paid off, and a discharge executed. In October, 1891, before the making of the final order of foreclosure in the first suit, and before the redemption of the mortgage in the second suit, a certificate of title was issued to the widow and executrix subject to the mortgage of July 12, 1881, the charge in favour of the infant, the mortgage of Sept. 1882, and a writ of *fi. fa.* of the Confederation Life, the last two being declared to attach upon the interest of

the widow as devisee only. In November, 1891, she sold a portion of the lands to Arthur Curzon and mortgaged the remainder to certain Trustees. The registrar-general decided to issue a certificate to the land sold, free from any prior encumbrance, and also, upon being satisfied that the mortgage of July 12, 1881, had been paid off to issue a certificate of charge on the remainder, declaring the mortgage to the Trustees to be a first charge upon it. To this the Confederation Life objected, and this petition was presented asking that it might be declared that the transfer to Curzon should not be registered, or if registered should be taken and considered only as dealing with or affecting the land subject to the legacy to the daughter and to the mortgage given by the executrix and devised to the Confederation Life. The contention of the latter was that under the circumstances the devisee was the person to convey, and by virtue of the mortgage from her of September, 1882, which they had foreclosed, they had a complete title to the land.

Dawson for the Confederation Life.
C. P. Wilson for the District Registrar.
Cameron for the infant.
Phippen for the mortgagees.

Held—

The decision of the District Registrar should be upheld. Lord St. Leonard's Act, 22 and 23 V., c. 35, does not apply. *Smith's Equity*, 299; *Corser* v. *Cartwright*, L. R. 7 H. L. 731; *West of England etc. Bank* v. *Murch*, 23 Ch. D. 138; *Lewin on Trusts*, 18th ed., 465; *Tanqueray-Willaume & Landau*, 20 Ch. D. 465; and *Confed. Life* v. *Moore*, 6 M. R. 162.

Appeal dismissed with costs.

RE ST. BONIFACE ELECTION.

OCTOBER 24, 1892.] [TAYLOR, C.J.

Election petition—Preliminary objections—Deposit in "current money of Canada"—What is.

Hearing of preliminary objections on election petition.

Hagel, Q.C., for petioner, Francois Carrière.

Howell, Q.C., and *C. P. Wilson* for respondent, J. E. P. Prendergast, objected, *inter alia*, that the security to be given in accordance with sec. 22 of the Man. Controv. Elections Act, $750 current money of Canada, had not been deposited with the prothonotary as required by that Act; the section says "the security shall be given by a deposit with the prothonotary of the sum of $750, current money of Canada;" what was deposited was in bills of a bank or banks chartered by the Parliament of Canada; such is not "current money of Canada" in the legal sense.

Held—

After a consideration of *Wharton's Law Lexicon*, "Currency"; *Price's Political Economy*, 40; *East's Pleas of the Crown*, (introduction to chapter on offences relating to the coin; *Am. and Eng. Ency. of Law*, "Money"; *Morris* v. *Edwards*, 10 Ohio 204; *Wharton* v. *Morris*, 1 Dall. 124; and 55 Vic., c. 12, s. 9 (Man.), amending sec. 99 Man. Election Act, that in the light of all these authorities the "current money of Canada" must be money authorized by caps. 30 or 31, R. S. C., that is, gold coin or Dominion notes.

Petition dismissed with costs.

THE

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MANITOBA.

IN THE QUEEN'S BENCH.

ASHDOWN v. MONTGOMERY.

OCTOBER 11, 1892.] [DUBUC, J.

Limitation of action—Running account—Payment thereon—Purchase of new goods—Effect of.

Declaration: three promissory notes, due in May, June and July, 1885; also common counts.

Defence: statute of limitations; action commenced September 16, 1891.

Defendant was a blacksmith and purchased goods from, and had a running account with the plaintiff, a hardware dealer. The last of the notes sued on was dated May 8, 1885, and the last two items in the ledger for goods sold were dated May 15 and 30 respectively. A cash item of

$97 was credited on September 22, 1885. In May, 1889, the defendant purchased from plaintiff goods to the amount of $14.99, not paid for.

Culver, Q.C., for plaintiff.

Elliott for defendant.

Held—

The item of goods bought in May, 1889, did not not have the effect of taking the whole account out of the statute. "When, as in this case, a running account has been stopped and considered closed, I do not think it can be revived and kept out of the statute by a new item for goods sold four years afterwards, although the six years prescribed by the statute have not yet expired."

2. The payment on September 22, 1885, took the account out of the statute.—*Tippets* v. *Heane*, 1 Cr. M. & R. 252; *Boultbee* v. *Burke*, 9 Ont. 80; *Wilson* v. *Rykert*, 14 Ont. 188; *Nash* v. *Hodgson*, 6 De. G. M. & G. 474.

Verdict for plaintiff for $517.81 and interest from date of issue of writ.

TEMPLETON v. STEWART.

OCTOBER 20TH, 1892.] [BAIN, J.

Examination de bene esse—Reading depositions at trial—Affidavit of absence of witness under R. S. M., cap 1, s. 48—Extent of that section.

The depositions of a witness, resident out of the jurisdiction, but temporarily within, were taken some two months before the trial under an order *de bene esse*. Notice of motion of intention to use the depositions at the trial, supported by customary affidavit, had been duly given.

Howell, Q. C., for the plaintiffs, *Nugent* and *Martin* with him, filed and read an affidavit of the plaintiff's solici-

tor, under sec. 48 of cap 1, R. S. M., to the effect that the witness was not within the province, and contended that irrespective of the notice of motion he was, on that affidavit, entitled to read the depositions.

Culver, Q. C., for the defendants, *Sutherland* with him, objected that the section did not apply to depositions taken *de bene esse.*

Held—

The section did apply to such a case. Depositions directed to be read.

THE DEAN AND CHAPTER OF ST. JOHN'S CATHEDRAL vs. MACARTHUR *ET AL.*

NOVEMBER 3, 1892.] [BAIN, J.

Mortgagor and mortgagee—Release of equity of redemption—Merger—Amendment—Costs.

Plaintiffs were first mortgagees, and had obtained from the mortgagor a release of the equity of redemption under a settlement of the differences between them by which plaintiffs were to obtain this release and releases and discharges of all other incumbrances and charges. There was a judgment against the mortgagor at the suit of Duncan MacArthur, binding the lands, but relying on the statement of the mortgagors agent that the judgment had expired, plaintiff's solicitors accepted the deed of release and delivered to the mortgagor a release from his liability on the covenant in the mortgage, and subsequently applied for a certificate of title under the Real Property Act, whereupon Duncan McArthur claimed that his judgment, which, it appeared, had in reality not expired, was a first charge on the lands and that the acceptance of the release by the plaintiffs from the mortgagor operated as a merger of their first mortgage.

The bill filed prayed a decree that the release to the plaintiffs by the mortgagor was not a merger of their mortgage and that the interest of Duncan MacArthur might be foreclosed, or in the alternative that the release to the plaintiffs might be set aside and all the defendants foreclosed.

Ewart, Q. C., and *Cumberland* for plaintiffs.

Culver, Q. C., for defendants David MacArthur, Duncan MacArthur, Jane Gilmour and the Commercial Bank of Manitoba.

Held—

1. The plaintiffs having both knowledge and constructive notice of the judgment, and not having by either acts or words expressed any intention that their mortgage should be kept alive, the conveyance to them of the equity of redemption operated as a merger and the judgment was entitled to rank as a first charge on the lands ; *Forbes* v. *Moffat*, 18 Ves. 384, distinguished ; *Toulmin* v. *Steere*, 3 Mer. 210, followed. "I take the effect of the decision to be that if a first mortgagee, with notice of a subsequent incumbrance, get in the equity of redemption, then in the absence of express intention that his mortgage is to be kept alive it will be deemed to be merged or extinguished" ; *Adams* v. *Angell*, 5 Ch. D. 634 ; *Coote on Mortgages*, 645 ; *Davis* v. *Barrett*, 14 Beav. 542.

2. Even though "the plaintiffs solicitors were misled and thrown off their guard by the statement of Mr. Gilmour, that Duncan MacArthur's judgment had been allowed to expire," yet "Gilmour was acting altogether as agent for David McArthur (the mortgagor) and in no way represented Duncan MacArthur," and the effect of the arrangement practically was that the plaintiffs had "made a present of their land" to Duncan MacArthur without intending to do so.

Bill dismissed with costs as far as Duncan MacArthur was concerned.

3. The plaintiffs, however, were entitled to remedial interference as David MacArthur had entirely failed to carry out his agreement to obtain such releases as would give them a clear title, and no intervening equities having arisen all parties should be replaced in the position in which they were when the negotiations for a settlement began ; all necessary amendments allowed to effect that object, *Gough* v. *Bench*, 6 Ont. 699.

Costs allowed to Duncan MacArthur, but not to the mortgagor ; the other defendants who filed answers disclaiming any interest, on which the plaintiffs joined issue, to be allowed costs subsequent to the filing of the answers.

FRENCH v. MARTIN.

NOVEMBER 14, 1892.] [IN CHAMBERS—BAIN J.

Garnishee order—Requirements of affidavit for—Delay in moving against—Order a nullity if affidavit not in accordance with statute—Construction of statutes relating to procedure—Condition precedent.

Garnishee order.

Plaintiff served a garnishee order on July 26, 1892, on the clerk of the Executive Council of the province of Manitoba, attaching all debts due and owing from him, as such, to the defendant.

On October 26 last, the defendant obtained a summons from the referee to set aside the order on the ground that the affidavit on which it was made, did not state that the person in whose hands the money was to be attached " is within the jurisdiction of the court."

The referee dismissed the summons, holding that because of the delay in moving against the order any defects there were had been waiued.

The defendant appealed and contended that the directions in section 8, of the Garnishment Act, as to what the affidavit for a garnishing order shall state, are imperative, and that an order issued on a defective affidavit was a nullity.

The last clause of the affidavit was :—

I have reason to believe that Christopher Grayburn, as the clerk of the Executive Council of the province of Manitoba, is indebted or liable to the said A. F. Martin, one of the above named judgment debtors, in the sum of $200

There was no statement, as required by the Act, that the third person indebted or liable to the judgment debtor "is within the jurisdiction of the court."

Monkman for plaintiff.

Darby for defendant.

Judgment—

The defendant wholly omits to state, as the section requires that the third person indebted or liable to the judgment debtor "is within the jurisdiction of the court"; but Mr. Monkman argues that the fact that he is within the jurisdiction is sufficiently indicated by his being described "as clerk of the Executive Council of the Province of Manitoba." In *Hamilton* v. *McDonald*, 2 M. R. 114, it was pointed out by the court that the object of this direction in the section is, that it shall be shown to the court that the person intended to be garnished is legally and judicially within the jurisdiction and so amenable to the orders of the court. But this remark was made in considering an affidavit, the objection taken to which only was, that it said the garnishees "reside" within the jurisdiction, instead of "are" within it. That affidavit was held to be sufficient, but there is manifestly so great a difference between that affidavit and the one before me that I cannot consider the case to be in point.

The statute gives the court jurisdiction to issue a garnishee order upon the filing of an affidavit stating certain facts, and it is a general rule of construction that enactments prescribing procedure in the courts are to be constructed as imperative. If parties desire to obtain the benefit of an enactment like this, there is nothing unreasonable in requiring that the strict observance of the procedure that is laid down is to be a condition precedent to the exercise of the powers confered, and accordingly as I pointed out in *McKay* v. *Nanton*, 7 M. R. 250, it has held that when the Legislature has seen fit to require certain things with an apparent intention that its requirements are to be adhered to, no supplemental or different mode even if it attains the same end, can in general be allowed. Even if I thought then, that it was a necessary inference from the affidavit that the garnishee was within the jurisdiction, I would still be of the same opinion that the total omission of the statement that he is within the jurisdiction, or if some express statement to the same effect was a fatal defect. I think, therefor, that the order issued on this affidavit was a nullity and should be set aside. I allow the appeal with costs both of this application and of the one before the referee.

LONG v. WINNIPEG JEWELLERY CO.

NOVEMBER 17, 1892.] [IN CHAMBERS—DUBUC, J.

Examination of party under R. S. M., c. 1, s. 3—No motion, application or proceeding pending—Power to strike out defence of corporation owing to non-attendance of officer.

Appeal from order of referee.

Action on bill of exchange. The defendants, an incorporated company, obtained an order for leave to appear and defend founded on an affidavit of one of its officers. The plaintiff obtained an order, *ex parte*, for the examination

of the deponent, but at the time no motion had been made to set aside the order for leave to appear. Deponent refused to attend and plaintiff took out a summons to commit or to strike out defence in alternative.

Hough, for the defendant, opposed the application on the grounds that (1) the affidavit of the officer had answered its purpose, and (2)—not taken before referee—there was no power to strike out the defence of an incorporated company because of the default of one of its officers.

Culver, Q.C., in reply.

Held—

There being no motion, application or proceeding pending before the court in which the affidavit of the officer was being or could be actually questioned, the affidavit had answered its purpose and the principle laid down in *Imperial Bank* v. *Taylor*, 1 M. R., 244, would apply ; had a motion been made to rescind order for leave to appear, or to strike out defence, the order to examine would have been regular.

2. Sec. 43 of the Admin. of Jus. Act clearly includes a corporation.

3. The section would be viewed in a different aspect and governed by other rules if the officer refused to attend, or to answer proper questions, because of hostility to the corporation.

Order reversing order of referee.

GRAHAM v. HAMILTON.

NOVEMBER 22, 1892.] [IN CHAMBERS—TAYLOR, C. J.

Petition under R. P. Act—Proceedings under cannot be stayed for non-payment of costs in Queen's Bench—estoppel.

Petition under Real Property Act. At the hearing *C. P. Wilson*, for the respondent, caveatee, objected

that the petitioner was not entitled to proceed because the costs of certain former proceedings on the chancery side in respect of the same alleged lien as is set up here had not been paid, and that in consequence the petition should be dismissed or proceedings stayed until payment of these costs.

Aikins, Q.C., in reply—These costs being incurred in a chancery suit and this being a proceeding under the Real Property Act, the ordinary rule does not apply.

Held—

The rule applies only where a second action is brought and this proceeding is not a suit or action in the Court of Queen's Bench; the court can have no jurisdiction to stay proceedings which arise out of the Land Titles Office under the act because costs have not been paid in the Queen's Bench—Compare *Shepherd* v. *Hayball*, 13 Gr. 681.

2. The fact that the claim now set up was raised by a petition in a foreclosure suit did not estop it from being set up on this application; the claim was then set up only as a ground why leave should be given to defend; a defendant is not bound to set up by ahswer a claim for cross relief, he may make it the ground for a suit brought by himself.

3. The petition alleged that the land was conveyed years ago, but petitioner claimed a lien for unpaid purchase money; until the statute of Limitations barred the claim delay could not be made a ground for refusing relief.

Objections over-ruled.

MUNICIPALITY SOUTH NORFOLK v. WARREN.

NOVEMBER 22, 1892.] [KILLAM, J.

Prohibition—Title to land in county court—Crown patent and imposition of taxes on interest in land before issuance of—R. S. M., c. 101, s. 5, not ultra vires—Dispute note not equivalent to a plea in law.

Application for prohibition to county court.

Action for taxes. Defendant by dispute note disputed the jurisdiction of the court to try the action so far as it related to taxes accrued before 1891 as, previously to October 16, 1890, it was Crown property.

In the assessment rolls the defendant was assessed as owner, and in the collection rolls his name appeared in a column headed "Owner or Tenant," but without distinction of capacity- The defendant took up the land in 1882 as a homestead and pre-emption, but never occupied it for over a few weeks at a time, thought he last occupied it in 1887, but might have been 1888, paid taxes from 1882 to 1887, entry was cancelled in 1890, government allowed him to nominate purchaser, which was done, defendant arranging to repay purchase money with interest, patent issued to purchaser on 31st October, 1890, defendant repaid purchaser and at time of trial was owner of the land.

Crawford for plaintiff—The assessment rolls are conclusive of the defendants liability.

Munson for defendant—Until the issue of the letters patent granting the lands they were not assessable and the inquiry as to the fact involved the trial of the question of title.

Held—

1. The assessment rolls were not conclusive upon the question of exemption; lands of the Crown held nnder homestead or pre-emption entry were assessable

as against the person so holding, R.S.M., c. 101, s. 5 ; the mode of describing the defendant in the roll was immaterial to his liability ; and as the defendant admitted his homestead and pre-emption entry, no question of title was in dispute.

2. When there were formal pleadings in the county courts a plea raising a question of title to land at once ousted the jurisdiction of the court, but formal pleadings having been abolished it became necessary to take the evidence sufficiently to ascertain if a question of title really did arise, if so the jurisdiction was again ousted, *Thompson* v. *Ingham*, 14 Q. B. 710.

3. A dispute note does not stand in the same position as a plea under under the old practice ; neither can a dispute note nor a statement of the grounds of defence, whether contained in the dispute note or in the affidavit, be placed in the position of a plea at law as a part of the record.

4. It was for the judge in the first instance to to determine whether a question of title arose, but his determination was not conclusive, and this court must inquire into the matter and ascertain whether the liability of the defendant is contingent upon the decision of a question of title upon which there is a real dispute.

5. R. S. M., c. 101, s. 5, taxing occupied unpatented lands, but not in any way affecting " the rights of Her Majesty in such lands " is not *ultra vires*. " I can see no reason why a Provincial Legislature should not provide for the imposition of taxation upon individuals by reference to the values of lands occupied by them respectively even though owned by Canada, nor why such legislature should not provide for the taxation of interests in Crown lands recognized by law to be

vested in individuals without thereby contravening the provision as to taxation of the property of Canada."

6. "It was open for the judge of the county court to determine whether the defendant in fact occupied the lands, although without title, and whether the defendant was so assessed as to be liable. This court can only prohibit if the defendant could not be held liable without trying the question of title. It appears to me that this might have been properly done, and I must therefore discharge the rule with costs."

Quære—Should the grounds of defence be stated in the affidavit or the dispute note, or in both ?

THE

WESTERN LAW TIMES REPORTS.

EDITOR:

ARCHER MARTIN,

BARRISTER-AT-LAW.

MANITOBA.

IN THE QUEEN'S BENCH.

TEMPLETON v. STEWART.

NOVEMBER 14, 1892.] [BAIN J.

Crown patent—Setting aside after investigation by crown—Attorney-General not a party where grant is from H. B. Co. prior to transfer to Canada—Applicability of common law as to married women to Rupert's Land—Law as to sale by married women in 1670—Statute of Limitations—Title by possession.

Bill filed to set aside crown patent to the north 3½ chains of the inner, and the north 3 chains of the outer 2 miles of lot 19 of the Dominion Government survey of the Parish of Kildonan, granted by the Dominion Government to the defendant, Robina Stewart. The defendant R. D. Templeton was joined as the husband of the deceased mother of the plaintiffs. The river lot 19 corresponds with lot 203 of the Hudson Bay Company's survey. In the H. B. Co's land register Robert McKay, one of Lord Selkirk's settlers,

appeared as having entered for it and the lot was entered under the column in that register headed "Acres granted by Lord Selkirk," but there was no other documentary evidence of his title. McKay lived on that lot from 1835 to 1853, when he died in possession of it. To the defendant, Robina Stewart, he devised the north 3½ chains of the lot. Plaintiffs, the heirs of defendant Stewart's sister who died intestate in 1882, claimed that Stewart, a married woman, had in 1863 sold the land to their mother, then also a married woman, and she, or they, had ever since occupied it and were in occupation. In 1887, the defendant Stewart applied for a patent to the said inner and outer two miles, and after a full investigation and examination of witnesses under oath before the Dominion Lands Commissioner in Winnipeg, and in spite of the evidence adduced before him by the plaintiffs, and with a full knowledge of the circumstances, the Crown, in February, 1891, granted patents to the said lands to the defendent Stewart, who thereupon applied for a certificate of title and served notice upon the plaintiffs, who filed a caveat, and subsequently, a petition, and finally, on the direction of Mr. Justice Dubuc on the hearing of such petition, this bill, pending the disposition of which the further hearing of the petition was adjourned and proceedings thereon stayed.

One of the conditions of the deed of surrender of the Hudson's Bay Company to the Crown was: "8. All titles to land up to the 8th March, 1869, conferred by the Company, are to be confirmed."

The Attorney-General of Canada, was not a party to the bill, and the court found that there were no fraudulent misrepresentations or contrivances by the defendant Stewart in obtaining the patent. The bill was taken *pro confesso* against defendant Templeton.

Howell, Q. C., *Nugent* and *Archer Martin* for plaintiffs.
Culver, Q. C., and *Sutherland* for defendant Stewart.

Under the state of facts above set out

Held—

1. Robert McKay must be presumed to have been the owner of an estate in fee simple in the lands under the Hudson's Bay Company—*Taylor on Evidence*, 147–51.

2. The lands having been granted by the Hudson's Bay Company before the transfer, and the heirs of Robert McKay being entitled to an estate in fee simple therein before the transfer, there was no estate left in the Crown, represented by the Dominion government, to grant, and the patent could have no further effect than to confirm the grant in fee already made by the Company. "The estates and interests of the several parties in the land were acquired independently of, and prior to the issue of the patent, and in my opinion the patent has not really affected the legal interests and rights that were acquired in the property under laws in force in the province. These interests and rights, whatever they were, come under the head of 'property and civil rights,' and this court is bound to recognize and enforce them. If the view I take of the case is correct, then, for some time previous to and at the time the patent was issued, the legal and beneficial title to the land in the inner lot was vested in the plaintiffs, or Alexander Templeton. By some means the defendant, Stewart, has obtained a Crown patent for the land that apparently vests the legal estate in it in her and I think the court has jurisdiction to declare and decree that, notwithstanding this Crown patent the land is not hers, but the plaintiffs, and to order her to execute conveyances of the land to them."

3. The outer two miles stand on a different footing, there being no evidence of a grant of them to McKay and the only evidence of possession being the exclusive

exercise of the right of cutting hay thereon by Robert McKay and his heirs for the period in each year during which the laws of Assiniboia formally recognized that right in the owners of the river lots; if the land became vested in the Crown under the deed of surrender, no one could acquire a title against the Crown by possession under the statute of Limitations.

4. The laws in force here prior to the transfer being the law of England as it existed on May 2, 1670, (date of the Hudson Bay Company's charter,) a sale of land could be by parol as the statute of Frauds was not then in force; the sale here being of property not separate estate by a married woman, was not objectionable on the ground of being a parol sale, yet could not be a valid one, even with the consent of her husband, as the Act for the Abolition of Fines and Recoveries, 1835, was not in force at the time of the sale; the contention of plaintiffs' counsel that so much of the common law of England as prevented a married woman from conveying her property with the consent of her husband was inapplicable to the local conditions of Rupert's Land in 1670, and was consequently not introduced by the early colonists, is over-ruled. "This rule of disability was an essential part of the common law and expressed the spirit and policy of the English people and English law on the legal *status* of married women, and it seems to me to have been applicable wherever English subjects were living subject to English law and quite independent of local conditions"; the legal existence of the wife was deemed to be merged in the husband and consequently she was under a total disability to contract—*Cahill* v. *Cahill*, 8 App. Ca. 428; *Emery* v. *Wase*, 5 Ves. 845; *Nicole* v. *Jones*, L. R. 3 Eq. 696, and *MacQueen on Hus. and Wife*, 63–5, 284–5.

5. Under ordinary circumstances when a man and his wife are living together and occupying land, the presumption is that the occupation is that of the husband and not of the wife, and where there is a parol gift to a married woman and the land is occupied and worked by her husband, she residing on the property with him as his wife, the title acquired by length of possession is that of the husband and not of the wife — *Vincent* v. *Morley*, 15 N. B. 375.

6. Defendant Stewart married before the Married Woman's Property Act took effect and without a settlement, and as her husband down to the time the Act took effect had not taken possession of the land it was then her separate property and whatever interest the patent conveyed to her would also be separate property, and she might then be sued as a *femme sole* without her husband.

7. The plaintiffs were, or rather their father, Alexander Templeton (who by his marriage had acquired an estate in freehold in his wife's land the effect of which was to give him the actual ownership of the land during the coverture) was entitled to the inner 3½ chains by virtue of possession and the statute of Limitations, R. S. M., cap. 89, s. 4—*Harris* v. *Mudie*, 7 A. R. 414—but the father by filing the bill as next friend for two of his children showed that he was willing to give up to the plaintiffs any interest he had in the lands, and as there would be no surprise and as it could make no difference to the defendant, except as regards the question of costs, and expenses of further proceedings would be avoided, there would be a decree, upon the plaintiffs filing a release to them from Alexander Templeton, declaring Robina Stewart a trustee for the plaintiffs, according to their several

interests, of the inner 3½ chains and directing her to execute conveyances of the respective shares.

Question of costs reserved till after release is put in.*

MASSEY MANUFACTURING CO. vs. CLEMENT.

NOVEMBER 28, 1892.] [TAYLOR, C. J.

Damages—Sheriff—Negligence in execution of fi. fa.—Withdrawal by reason of chattel mortgage—No discretion as to equity of redemption.

Action against the sheriff of the Western District for not levying upon the goods and chattels of one Cooper under writ of *fi. fa.* goods issued upon a judgment recovered by the plaintiffs. The defendant contended that owing to encumbrances upon the goods of Cooper he was justified in withdrawing from seizure and the plaintiffs had not sustained any damage by his so doing.

The learned judge found on the evidence that the sheriff was negligent in not having seized sooner than he did, and that had he seized and sold there would have been enough to pay off all the prior encumbrances and satisfy the plaintiffs' claim, even after allowing the sheriff one third more for expenses of threshing the crop than in the case of the execution debtor, a farmer, having done it himself.

Ewart, Q. C., and *Coldwell* for plaintiffs.

Peterson for defendant.

Held—

1. The plaintiff was entitled to a verdict for the amount of his execution with costs.

2. Such damage was caused to the plaintiffs by the negligence of the sheriff as to bring the case within the principles laid down in *Bales* v. *Wingfield*, 4 Q.B. 580, n. ; *Hobson* v. *Thelluson*, L.R. 2 Q.B. 642; and *Stimson* v. *Farnham*, L. R. 7 Q. B. 175.

* This release has since been filed with the Registrar.—ED.

3. In England there is no such provision as is found in R. S. M., c. 53, s. 21, and the sheriff is not justified in refusing to seize or in withdrawing because he finds chattel mortgages upon the property, as was the case in *Scarlett* v. *Hanson*, 12 Q. B. D. 213.

4. R. S. M., c. 53, s. 21 does not leave it discretionary with the sheriff whether he will seize and sell an equity of redemption; the language there used "*may* seize and sell" is not permissive but facultative, and does necessarily imply an option to abstain from doing an act to be done for the benefit of others—*Fonseca* v. *Schultz*, 7 M. R. 464.

Verdict for plaintiffs.

SOWDEN v. MOFFATT.

NOVEMBER 28, 1892.] [TAYLOR, C. J.

Ejectment—Mistake of purchaser—Improving property by mistake—Estoppel of owner by standing by.

Action of ejectment.

The defendant having purchased a lot in a town site proceeded to erect certain buildings, as he thought, on the lot he purchased, but in reality on a lot belonging to the plaintiff. The plaintiff saw the defendant erecting the buildings but did not know that the lot on which they were being erected was his property because the town site was laid out on the open prairie. The plaintiff also at the time he saw the defendant building on the land in question was not aware that it really was his property, nor that it had been conveyed to him under a partition of the town site.

Coldwell and *W. A. Macdonald* for the plaintiff.

Ewart, Q. C., for the defendant.

Held—

Under such a state of facts the plaintiff had neither at law nor in equity deprived himself of his interest in

the land, nor could it be considered that the defendant had acquired any interest in the property, or that the plaintiff had stood by and allowed an innocent purchaser to expend money on it—*Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Plummer* v. *Wellington*, 9 App. Ca. 699; *Proctor* v. *Bennis*, 36 Ch. D. 140; *Story's Equity* sect. 386, and *Marker* v. *Marker*, 9 Ha. 16.

RE BRANDON CITY ELECTION.

DECEMBER 1, 1892.] [KILLAM, J.

Controverted Elections act—Election petition—Preliminary objections—Summons to dismiss and discharge same—Practice on under R. S. M., c. 29.

Summons by petitioner in an election petition under R. S. M., c. 29, calling on respondent to show cause why the preliminary objections should not be "dismissed and discharged because no summons or appointment has been issued or served for the disposition of said preliminary objections, or to show cause why in the event of said presiding judge being of opinion that such an order should not be made, a time should not be fixed for the hearing, determining and disposing of said preliminary objections."

Petition presented on Sept. 15, served on 17th, respondent filed preliminary objections on 21st, no summons taken out for hearing thereof.

By section 37 of above act "within five days after the service of the petition the respondent may produce in writing any preliminary objections, etc." and by section 38 "the judge shall then hear the parties upon such objections and grounds and shall decide the same in a summary manner." Rule 14 provides: "Within five days after service of the petition . . the respondent may file in the office of the prothonotary a written statement setting out any preliminary objections . . and upon a summons being taken out by either party within five days

thereafter a judge shall hear the said objections . . and decide the same in a summary manner."

C. P. Wilson for petitioner relied mainly upon *Re St. Andrew's Election*, 4 M. R. 514.

C. H. Campbell for respondent.

Held—

1. The statute requires a judge to hear the parties upon the objections and decide in a summary way. The rule provides that upon a certain summons being taken out within a certain time the judge shall hear and decide the objections, and if such summons is not taken out within that time the statutory obligation to hear and decide the objections still remains, and the rule does not provide otherwise ; a party merely defending himself is usually entitled to take up a merely passive position, and so long as he performs within such periods as are allowed him such acts as are required of him and as he alone can perform, he may leave to the other party the pushing of the prosecution—*Re St. Andrew's Election* considered and dissented from.

2. There was no ground for calling on the respondent to show cause why a time should not be fixed for hearing the preliminary objections. It might not be unreasonable under the circumstances here found to give notice to the respondent of an intended application for an appointment to hear and dispose of the objections, but such is not the form of the summons.

Summons dismissed, costs to the respondent in any event.

CASE MACHINE CO. v. PENNER.

TAYLOR, C. J.
DECEMBER 3, 1892.] [FULL COURT—DUBUC, J.
KILLAM, J.

Order for machine—Written contract—Ignorance of true meaning of—Mistake—Cancellation of agreement—Foreigner.

Bill alleged purchase of a traction engine for $2,635, under written agreement providing for property in engine not passing and creating charge on land of defendant for purchase price ; also acceptance by the defendant. Prayer for payment of the whole amount, and for sale of land so charged, and costs.

Mulock, Q. C., for plaintiffs.

Howell, Q. C., and *Crawford* for defendant — The agreement was procured by fraud of plaintiffs' agent in that he pretended to interpret the same in German to defendant, a Mennonite, who could neither read or write write English, but in fact misrepresented its contents—*Bate* v. *Can. Pac. R'y. Co.*, 18 S. C. R. 697 ; *Laird* v. *Pim*, 7 M. & W. 478 ; *Sowden* v. *Standard Ins. Co.*, 5 A. R. 290 ; *Paget* v. *Marshall*, 28 Ch. D. 255 ; *Atwood* v. *Small*, 6 Cl. & Fin. 446, and *Smith* v. *Kay*, 11 H. L. 775.

At the trial, October 14 last, Bain, J., found as follows :

"I dismiss the bill with costs, and order that the defendant's agreement be given up to be cancelled. The order for cancellation not to be acted on if the plaintiff enters the case for rehearing within the usual time. The defendant is a Mennonite and neither speaks nor writes English. The evidence shows that the contract he made with Hoffman was that the plaintiffs were to supply him with a machine at Plum Coulee on 1st March, or perhaps within a day or two later, and that he was to give his note in payment. Hoffman knew that the defendant did not read English and he obtained the signature of the defendant to the order without in any way intimating to the defendant that it contained a different contract from the one the defendant thought he had made and the various agreements and conditions that it does. The plaintiff signed the paper in complete ignorance of its contents and never intended to enter

into the contract that is contained in it, and believing that he was entering into a different contract. There is not sufficient evidence of ratification and I cannot hold that the defendant is bound by the contract to which his signature has been obtained with the plaintiffs now seek to enforce."

The plaintifis appealed. The Chief Justice, the other learned judges concurring, at the close of the argument, delivered the following :

Judgment—

I am of opinion that the decree made by Mr. Justice Bain dismissing the plaintiffs' bill with costs should be affirmed, as I do not see how any other conclusion can be come to than the one to which he came. There never was any contract or agreement made by the defendant such as the plaintiffs are seeking to enforce, knowing that he was making it. The defendant is a Mennonite who speaks no English, and Hoffman, the plaintiffs' agent, knew that ; yet he took the man's signature to an agreement, of the contents of which he was ignorant. He was never informed that the contract was one qnite different from the one he thought he was making. This is clear from Hoffman's own evidence, for he says he was not aware that the conditions and stipulations which are in the agreement were actually in it. If so he cannot have explained them to him. The argument that Hoffman was in any sense the agent of the defendant when the agreement was signed cannot be sustained. The re-hearing must be dismissed and the decree affirmed with costs.

[END OF VOLUME III.]

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